CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 65

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WADDILL, HOLLAND & FLINN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

PETITION FOR CERTIORARI FILED APRIL 24, 1944
CERTIORARI GRANTED MAY 29, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 925

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WADDILL, HOLLAND & FLINN, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

INDEX

	Original	Print
Proceedings in Supreme Court of Appeals of Virginia	1	1
Petition for appeal from Corporation Court of City of Danville	1	1
Recital as to granting of appeal and supersedeas	10	9
Record from Corporation Court of City of Danville	10	9
Caption	10	9
Petition	11	10
Memorandum	16	13
Distribution of assets of Roman's Restaurant	16	14
Deed of assignment, Mrs. Oeland R. Roman to Earle Garrett, Trustee, June 19, 1941	18	15
Correspondence	21	17
Second petition	25	21
Answer of Waddill, Holland & Flinn, trading as Hotel Burton	27	22
Answer of Unemployment Compensation Commission	28	22
Answer of United States	29	24
Stipulation of counsel as to certain facts	30	25
Opinion of Judge Leigh	32	26
Decree, January 5, 1943—Appealed from	41	34
Clerk's certificate	42	35
Opinion, Eggleston, J.	43	36
Judgment	57	45
Clerk's certificate [omitted in printing]	58	45
Order allowing certiorari		46

1 In the Supreme Court of Appeals of Virginia
at Richmond

Record No. 2733

UNITED STATES OF AMERICA, ET AL.

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

Petition for Appeal from the Corporation Court of the City of Danville, Virginia

Filed May 1, 1943

To the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

Your Petitioner, the United States of America, respectfully represents that it is aggrieved by the final judgment entered in the Corporation Court of the City of Danville, Virginia, on the 5th day of January 1943, in the Chancery cause of United States of America, et al., v. Waddill, Holland & Flinn, Inc., et al., by which judgment priority of payment out of the funds in the hands of Earle Garrett, Trustee, was denied your Petitioner.

Statement of Proceedings

Earle Garrett, Trustee under deed of assignment from Oeland R. Roman, filed his bill in chancery in the Corporation Court of the City of Danville, Virginia, praying adjudication of the rights of creditors of assignor in priority of payment from the funds in his hands.

2 The United States, the Unemployment Compensation Commission of Virginia, the City of Danville, Virginia, and Waddill, Holland & Flinn, Inc., filed answers in said cause, each claiming priority of payment out of the funds in the hands of Earle Garrett, Trustee.

A stipulation as to the necessary facts was entered into by counsel.

The Trial Court rendered its opinion November 19, 1942.

Decree was entered January 5, 1943, by the terms of which Earle Garrett, Trustee, was directed to disburse the funds in his hands by payment of the cost of the proceedings with attorney's fee of $100.00, the sum of $222.31 to the City of Danville, and the residue of said funds to Waddill, Holland & Flinn, Inc.

Error assigned

The Trial Court by the entry of its decree of January 5, 1943, erred in failing to recognize and give effect to the right of the United States to have its claim first paid out of the funds in the hands of Earle Garrett, Trustee, as provided by Section 3466, Revised Statutes (31 U. S. C. 191), and before payment of the claims of the City of Danville, and Waddill, Holland & Flinn, Inc.

The facts

Mrs. Oeland R. Roman on June 19, 1941, executed and delivered to Earle Garrett, as Trustee, a deed of assignment for the benefit of assignor's creditors wherein was conveyed all property of assignor, which deed of assignment was on that day recorded in the office of the Clerk of the Corporation Court of the City of Danville. The said deed provided for payment of the creditors in the order of priority as established by the acts of Congress relating to Bankruptcy, namely, 11 U. S. C. 104.

The property assigned in the said deed was located on real estate owned by Waddill, Holland & Flinn, Inc., which corporation levied a distress warrant on July 1, 1941, for accrued rent of $870.00, and on the same day levied an attachment for future installments of rent in the amount of $650.00.

On July 2, 1941, the City Collector of Taxes for the City of Danville distrained the said property for taxes assessed for the years 1939, 1940, and 1941. No sale was held under the proceedings of attachment or distraint. The Trustee on
3 June 26, 1941, sold the property of assignor for the sum of $1,680.80.

The Trustee held the following claims, each demanding priority of payment out of the funds in his hands:

(1) The United States claimed priority to the extent of $1,278.63, with interest at the rate of six per cent per annum from May 21, 1941, which claim represented the amount due and payable on a note signed by Mrs. Oeland R. Roman, the assignor, payable to the American National Bank and Trust Company of Danville, Virginia, and by it assigned to the United States on March 21, 1941.

(2) The United States claimed priority on the sum of $281.00, with interest on $209.30 at the rate of six per cent per annum from December 2, 1941, and interest at the rate of six per cent per annum from February 1, 1942, on $71.70, which sums with interest represented Federal Unemployment Compensation tax due by Mrs. Oeland R. Roman.

(3) The Virginia Unemployment Compensation Commission claimed priority in the sum of $66.38, with interest on $39.75 at the rate of one per cent per mensem from May 1, 1941, and on $26.63 at a like rate of interest from August 1, 1941, representing taxes due by Mrs. Oeland R. Roman.

(4) Waddill, Holland & Flinn, Inc., claimed priority in the sum of $1,500.00, representing as to $850.00 rent due and as to $650.00 rent to become due by Mrs. Oeland R. Roman to the said Corporation for use of a building owned by said Corporation in which Mrs. Oeland R. Roman, the assignor, conducted a restaurant business.

(5) The City of Danville claimed priority in the sum of $222.31 representing taxes due the City of Danville, Virginia, for the years 1939, 1940, and 1941, on furniture and fixtures owned by Mrs. Oeland R. Roman and used in the operation of the said restaurant business.

(6) The Virginia Unemployment Compensation Commission does not claim priority over the claims of the United States.

The argument

It is the belief of the United States that its claims filed with Earle Garrett, Trustee, and heretofore enumerated should have been paid first out of the funds in the hands of the Trustee after payment of the cost of administration of the trust.

4 The basis for this contention is the provision of Section 3466, Revised Statutes (31 U. S. C. 191), which is as follows:

Whenever any person indebted to the United States is insolvent, or whenever the statute of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The framers of the Constitution of the United States, being certain of the fact that the United States would from time to time be called on and required to come into State Courts to protect its interests therein, incorporated in the Constitution Clause 2 of Article VI by which the several states recognized the said Constitution and the laws made pursuant thereto to be the supreme law of the land and bound the judiciary thereto.

Section 3466 of the Revised Statutes of the United States being a Federal statute, the interpretation and construction of same are by accepted judicial practice a matter for the Federal Courts since judicial construction, where the same exists, is considered as much a part thereof as if written into the statute, and is a matter for the judicial branch of the government enacting such statute. With this in view, I desire to point out that the statute is entitled to a liberal construction, as is held in United States v. Johnson, 87 F. (2d) 155.

The effect of State law

The provisions of Section 3466, Revised Statutes, cannot be nullified or limited by State law. This is universally held. The right to priority of payment provided by this section attaches when the conditions specified by this section come into existence, and cannot be impaired or superseded by State law. United States v. Oklahoma, 261 U. S. 253, 43 S. Ct. 295, 67 L. Ed. 638.

5 *Claims of the United States*

The claim of the United States for $1,278.63, with interest, is a debt assigned by the American National Bank and Trust Company to the United States under the provisions of the Federal Housing Administration Act prior to June 19, 1941, the date of the execution of the deed of assignment, and is a debt due the United States, as contemplated by Section 3466, of the Revised Statutes. See C. F. Korman v. Federal Housing Administration, 113 F. (2d) 743; Wagner v. McDonald, 96 F. (2d) 273; in re Weil, 39 Fed. Sup. 618. The claim of the United States for taxes is likewise a debt due the United States, as contemplated by the aforesaid statute. See Price v. U. S., 269 U. S. 492, 70 L. Ed. 373.

Right of assignor to defeat priority given by section 3466, of the Revised Statutes

An examination of the deed of assignment certified as an exhibit, along with the Record in this case, shows that the grantor therein has attempted to defeat the provisions of Section 3466 of the Revised Statutes by providing for distribution of funds coming into the hands of the trustee "under the acts of Congress relating to bankruptcy," presumably Section 104 of Title 11, United States Code. The effect of distribution under this section would be to defeat the provisions of Section 3466, Revised Statutes, and the priority therein given the United States.

This provision in the deed of assignment is without effect insofar as claims of the United States are concerned for the grantor in a deed of assignment is powerless to do that which the State of Virginia can not do, namely, alter or defeat the provisions of the above-named statute. Further, this statute would be of little value if it were at the mercy of every assignor. The foregoing conclusion is reached in the following cases: In re Kupsbire Coats, 272 N. Y. 221; in re Assignment for Benefit of Creditors of T. J. Simpson, 15 N. Y. S. (2d) 1021. In addition, the Court in the former case made the following applicable statement:

We are of the opinion that all claims of the United States in a voluntary assignment have preference over all other claims, including wages, and that the Bankruptcy Act only applies to cases of bankruptcy and to proceedings in the bankruptcy court, or coming within its jurisdiction.

6 *The debt due United States has priority over claim for rent*

It is the petition of counsel that the above-described claims of the United States have priority over the claim of Waddill, Holland & Flinn, Inc., for rent, and should be first paid out of the funds in the hands of the Trustee.

The said Corporation claims rent in the total sum of $1,500.00, $850.00 of which represents rent past due and $650.00 representing the rent to become due. The said Corporation had distress warrant and attachment for the said sums on July 1, 1941, from the Civil Justice Court of the City of Danville, Virginia.

The right of the United States to preference of payment out of the funds in the hands of the Trustee arose and became fixed on the date of the execution of the deed of assignment and no act thereafter taken by any party could affect its right of preference which attached on that date. See United States v. Oklahoma, supra; Spokane Co. v. United States, 279 U. S. 80, and United States v. Texas, 314 U. S. 480.

On June 19, 1941, Waddill, Holland & Flinn, Inc., not having issued and levied its attachment, had only an inchoate lien on the property involved. See American Exchange Bank v. Goodlee Realty Corp., 135 Va. 204, 216, 116 S. E. 505; and W. T. Grant Co. v. Snead (C. C. A., 4), 37 F. (2d) 705. Such lien can have no effect on the priority established by Section 3466, Revised Statutes, as is held in the following cases: United States v. Kent, 298 U. S. 544, 56 S. Ct. 902, 80 L. Ed. 1321; United States v. Texas, supra.

The Trial Court by its opinion rendered November 19, 1942, and certified as a part of the record of the proceedings in said

Court, dealt at length with the nature of Waddill, Holland & Flinn's claim for rent. This claim being being for rent, the Court determined that the said Corporation held a specific and perfected lien, therefore, on the property assigned to Earle Garrett, Trustee, and, therefore, should be paid first out of the funds in his hands.

Counsel believes that the Trial Court was in error in holding that the said Corporation held a lien on the property of a specific and perfected nature by virtue of its relationship as landlord. It is found at common law that no lien existed in favor of the landlord for rent by virtue of the relationship of landlord and tenant, and that the landlord only had a lien after
7 exercising the right of distraint. See American Exchange Bank v. Goodlee Realty Corp., supra, 9 A. L. R. 300, 32 Am. Juris. 461.

The fact that the landlord's claims for rent age now covered by statute in Virginia (Code of Virginia, Secs. 5523, 5524), does not change the nature of his lien insofar as the facts in this case are concerned. In the above-mentioned case, the American Exchange Bank v. Goodlee Realty Corp., supra, the Court deals at length in comparing the present Virginia statutes on the question with the common law and therein arrives at the conclusion that the nature of the landlord's so-called lien has not been changed.

In holding that the landlord in Virginia has only an inchoate lien prior to the levy of a distress warrant or attachment, Judge Sims in writing the opinion of the Court states at page 215 in the above-mentioned case:

It is true, as urged in behalf of the defendant lienholder in the instant case, that, accurately speaking, neither section 5524 nor section 5523 of the present Code (which were sections 2792 and 2791 of the Code of 1887) gives the landlord any lien for rent (Burks' Pl. & Pr. (1st Ed.), Sec. 13, pp. 12–14); although in some of the cases discussing the subject statutes like section 5524 are referred to as giving the landlord a lien. But it is apparent from the facts of such cases that what is meant thereby is that such statutes give the landlord the right to have the property remain on the premises subject to his inchoate lien unless the terms of the statute permitting removal thereof are complied with. (See Wades v. Figgatt, 75 Va. 575; Anderson v. Henry, 45 W. Va. 319, 31 S. E. 998; Burket v. Boude, 3 Dana (Ky.) 209. Compare Mutual Fire Ins. Co. v. Ward, 95 Va. 231, at page 247, 28 S. E. 209.) In this State the only methods by which a landlord can obtain a lien for rent, prior to a judgment and execution therefor, is by distress warrant or attachment levied on the property liable for rent while it is on the leased premises, or within thirty days after

its removal therefrom. (See chapter 227 and section 6416 of the Code.) Until a lien is thus obtained the landlord's right to a lien is inchoate in this State.

The foregoing quotation is cited with approval in W. T. Grant Co. v. Snead, supra.

This being true, the landlord's lien, if any, as existing on the date of the execution of the deed of assignment, was in-
8 choate and neither specific nor perfected in nature, since the landlord had on that date taken no act to gain nor perfect a lien for rent. In this connection, it should be recalled that the preference of payment given the United States by Section 3466, Revised Statutes, does not give way before any lien which is not specific and perfected in nature on the day when the right of payment to the United States arises, namely, in this case, June 19, 1941. See U. S. v. Knott, supra.

The debt due United States has priority over claim of City of Danville for taxes

It is the position of counsel that the claims of the United States have priority over the claim of the City of Danville for taxes for the following reason:

The right of the United States to payment having attached on June 19, 1941, is superior to the claim of the City of Danville, since the said City's claim for taxes had not been perfected by distraint of the property. Such distraint was not had until July 2, 1941, and any lien which the City may have had at the time of execution of the deed of assignment was inchoate in nature and neither perfected nor specific. Spokane v. U. S., supra, and U. S. v. Texas, supra.

The Trial Court in its aforesaid opinion likewise dealt with the claim of the City of Danville for taxes, and, in final analysis, held the same to be a claim superior to that of the United States, and in its decree entered in this cause directed that the said claim for taxes be paid by the Trustee after payment of cost incident to the administration. What has been said concerning the inchoate nature of Waddill, Holland & Flinn's landlord's lien as applying to the statute on which the United States relies is likewise applicable to the claim of the City of Danville for taxes.

It is found that on June 19, 1941, the City of Danville had not taken steps to perfect any lien which it might have for taxes. Not until July 2, 1941, and after the date on which the right of prior payment was acquired by the United States, did the City distrain the property in question for the amount of taxes due it. The case of United States v. Texas, supra, deals specifically with

the matter of taxes due a State as giving priority over a claim due the United States under Section 3466, Revised Statutes, and specifically holds that any claim for taxes by a state arising on a lien neither specific nor perfected will not take preference over a claim due the United States under the above-mentioned statute.

It is quite obvious in this case that the claim of the City
9 of Danville for taxes was neither specific nor perfected and for that reason the City held no lien which could in any instance give it a right of priority of payment over the United States.

The right of the United States to priority of payment over holders of specific and perfected liens

It will be noted that none of the cases dealing with Section 3466 of the Revised Statutes decided by the Supreme Court of the United States goes so far as to say that the holder of a specific and perfected lien is entitled to preference over the United States.

In the cases of United States v. Texas, supra, New York v. Maclay, 288 U. S. 290, and Spokane Co. v. United States, supra, the Court took pains to make clear that it intended to lend no support to the assumption that the doctrine of the mortgage cases requires the subordination of unsecured claims of the United States to a specific and perfected lien. Reservations of this character in the opinion of the Supreme Court of the United States lend a reasonable basis for the contention that a claim of the United States is entitled to priority under the act in question over any lien, whether or not "specific and perfected."

A transcript of the Record of this suit in the Lower Court and of the official decree therein rendered is herewith exhibited, from which it appears that the Supreme Court of Appeals has jurisdiction.

Counsel for your Petitioner intend to file this petition in vacation at Roanoke, Virginia, with Honorable E. B. Gregory, Justice of the Supreme Court of Appeals, and desire to state orally before said Justice the reasons for reversing the decision and action of the Court hereinabove complained of.

Wherefore, your Petitioner prays that it may be granted an appeal from the judgment of the Corporation Court of the City of Danville, as aforesaid.

UNITED STATES OF AMERICA,
By F. S. TAVENNER, JR.,
United States Attorney.
HENRY T. CLEMENT,
Assistant United States Attorney.

10 *Certificate*

I, the undersigned attorney at law practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion there is error in the judgment complained of in the foregoing petition for which said judgment should be reviewed and reversed.

Given under my hand at Roanoke, Virginia, this 30th day of April 1943.

F. S. TAVENNER, JR.

Certificate

I, Henry T. Clement, do hereby certify that copies hereof have this day been mailed to the following opposing counsel in the Trial Court: Crews & Clement, attorneys for Waddill, Holland & Flinn, Inc., Danville, Va.; E. Walton Brown, attorney for the City of Danville, Danville, Virginia; Calvin Berry, attorney for Earle Garrett, Trustee, Danville, Virginia; and Kenneth C. Patty, attorney for the Unemployment Compensation Commission of Virginia, Richmond, Va.

Given under my hand at Roanoke, Virginia, this 30th day of April 1943.

HENRY T. CLEMENT.

[File endorsement omitted.]

Appeal and Supersedeas granted. Bond $300.00. May 13, 1943.

H. B. G.

Received May 14, 1943.

M. B. W.

In Corporation Court of City of Danville

Be it remembered that on the 20th day of April 1942, came Earle Garrett, Trustee, under general deed of assignment
11 from Mrs. Oeland R. Roman, trading as Roman's Restaurant and filed his petition in the Corporation Court of Danville, and of The United States of America, Unemployment Compensation Commission of Virginia, The Chesapeake and Potomac Telephone Company of Virginia, Hotel Burton, Metro Products Company, the Register Publishing Company, Patton, Temple & Williamson, Incorporated, City of Danville, Danville, Virginia, Stratford College, J. P. Wells, American National Bank & Trust Company and Philip Greenberg Market against Waddill, Holland & Flinn, Incoporated, a partnership trading as Hotel Burton, S. Gumpert Company, Incorporated, and National Outdoor Advertising Corporation in the following words and figures, to wit:

Petition

Filed April 20, 1942

To the Honorable HENRY C. LEIGH, *Judge of said Court:*

Your petitioner, Earle Garrett, shows unto the Court as follows: That he was made trustee under a General Deed of Assignment for the benefit of creditors by deed dated June 19, 1941, by Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, Danville, Virginia, which said General Deed of Assignment was recorded in Your Honor's Court on June 19, 1941; that said Deed of Assignment contained among other provisions, the following:

"Said Trustee shall only recognize and pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof, if any, and those having a lien shall be preferred only to the extent of the value of the property upon which they have a lien. It being the intention of the party of the first part to provide for the expeditious settlement of this trust and to allow only such preferences and priorities as are now required or allowed under the acts of Congress relating to bankruptcy. After paying all preferred and lien creditors, and after satisfying the landlord's lien for rent, the balance shall be distributed pro rata among all creditors of said party of the first part, without preference or priority.

In the execution of this trust said trustee shall have all of the rights and authority, and be subject to all of the duties
12 imposed by Chapter 213A of the Code of Virginia.

This assignment is made with the distinct understanding that all creditors of said party of the first part who accept the benefits of this trust do so in full satisfaction of their respective claims, and shall be forever barred from further recovery of any balance."

A copy of said general deed of assignment is filed herewith marked "Exhibit General Deed of Assignment" for the benefit of creditors.

Pursuant to said General Deed of Assignment, the trustee named therein proceeded to execute the terms thereof and did sell at public auction the property set out in said Deed of Assignment on June 26, 1941, the proceeds from said sale amounting to a total of $1,680.80.

The trustee under said Deed of Assignment has expended the following sums: To C. Stuart Wheatley, Clerk, costs $6.60; Registered Letters to creditors $2.10; labor, inventory and preparation of items for sale, $29.00.

That there are various creditors claiming priority in the distribution of the assets in the hands of Earle Garrett, Trustee, as

hereinafter set out; that various creditors who claim priority are seeking to hold said trustee personally liable if their claims are not recognized as having priority over all other creditors; that if said trustee should pay out the proceeds in his hands to one or more creditors claiming priority, he would not have a sufficient amount remaining to pay other creditors who claim priority in the distribution of said assets.

That the United States through N. B. Early, Jr., Collector of Internal Revenue, claims priority for the Federal Unemployment Compensation tax as follows: (a) Compensation tax—

$281.09+$5.19	$286.28	
Federal Unemployment Compensation Tax for 1940	$209.39	
With interest from 12/2/41 to April 8, 1942		$4.39
Federal Unemployment Compensation Tax for 1941	$71.70	
With Interest from 2/1/42 to April 8, 1942		$0.80
	$281.09	$5.19

13 as shown by claim filed herewith as "Exhibit N. B. Early, Jr., No. 1;" that the United States through N. B. Early, Jr., Collector of Internal Revenue, claims priority for Federal Insurance contributions tax and Federal Unemployment tax as follows:

(b) Federal Insurance and Unemployment Tax $66.45+$2.36		$68.81
With interest on $58.48, a part thereof, from 8/15/41	$2.27	
With interest on $7.97 from 2/1/42	.09	
	$2.36	

as shown by "Exhibit N. B. Early, Jr., No. 2" filed herewith; that the United States through Perry M. Armstrong, Attorney for the Federal Housing Administrator claims priority for the United States in the sum of $1,278.63 with interest at the rate of 6% per annum from March 21, 1941, under Title 31, Chapter 6, Section 191, U. S. Code, as shown by "Exhibit Perry M. Armstrong, No. 1," filed herewith; that the State of Virginia through Edwin S. Reid, Chairman, claims priority for the Unemployment Compensation Commission as follows:

(c) State of Virginia Unemployment Compensation Commission $66.38+$0.55		$66.93
With interest on $39.75, a part thereof, from May 1, 1941, 1% per month until paid	$0.37	
And on $26.63 from August 1, 1941	.18	
	$.055	

under and by virtue of the provisions of Section 1887 (106c) of the 1940 supplement to the Code of Virginia, as shown by Exhibit Unemployment Compensation Commission of Virginia No. 1 filed herewith; that W. L. Gibson, City Collector, claims prio*rotu* for the city of Danville on taxes due in the sum $300.55 as shown by Exhibit W. L. Gibson No. 1 filed herewith.

14 That other claims filed with the trustee under said Deed of Assignment within 60 days from recordation of same on June 19, 1941 are as follows:

C. & P. Telephone Company	$22.94
S. Gumpert Company, Inc.	21.82
National Outdoor Sign Co.	300.00
Hotel Burton	15.83
Metro-Products Company	9.00
Register Publishing Company	50.58
Patton, Temple & Williamson, Inc.	216.18
City Water, Gas & Electric Dept.	227.09
Stratford College	6.00
J. P. Wells	430.70

Your petitioner further shows that the claim of the United States (Exhibit N. B. Early, Jr., No. 1) for $281.09 was not filed within 60 days from June 19, 1941, the date of recordation of said General Deed of Assignment. Nor was the claim of the United States (Exhibit Perry M. Armstrong No. 1) for $1,278.63 with interest at 6% per annum from March 21, 1941, filed within 60 days from June 19, 1941.

Your petitioner further shows that the above constitute all of the creditors of Roman's Restaurant known to your petitioner, with the exception of Waddill-Holland & Flinn, Inc. Agents for Waddill-Holland & Flinn, *Ltd.* partnership trading as Hotel Burton, which refuses to come in under said General Deed of Assignment and are asserting a claim as landlord in the sum of $650.00 for rent alleged to be due and payable on the building formerly occupied by Roman's Restaurant. Said landlord also contends that it has a preference and priority as to the funds in the hands of your petitioner as trustee under said General Deed of Assignment. Said landlord has heretofore, through Crews & Clement, its attorneys, obtained a Distress Rent Warrant dated July 1, 1941, and an attach*em*nt dated July 2, 1941, both having been issued from the Civil Justice Court of Danville, Virginia, copies of which are filed herewith marked Exhibit Distress Rent Warrant and Exhibit Attach*em*nt. Your petitioner understands that said landlord is making a cl*ai*m for a period of six months under the Virginia Statute. The levy of the Distress Rent Warrant and Attachement was made by the Constable before the sale of the Trustee but after recordation of the General Deed of Assignment.

15 Expenses of Sale are as follows:

Lavinder & Howze, one 3 x 6 banner	$5.00
J. D. Ley, Inc. auctioneer fee	75.00
Register Publishing Company	17.70
Danville Printing Company	5.61
City of Danville, Electric Dept.	3.77

Other general creditors known to your petitioner are as follows:

American National Bank & Trust Company, Danville, Virginia, note endorsed by Isaac Harris and Moses Roman	$110.00
Phillip Greenberg Market—account	80.00
American National Bank & Trust Company, Danville, Virginia, two notes aggregating	415.70

It is obvious therefore that there is a conflict among the creditors as to the question of priority of payment from the proceeds now in the hands of your petitioner as trustee; that certain creditors are seeking to hold your petitioner as trustee personally liable for the disposition of the proceeds in the hands of your petitioner as trustee; that your petitioner is advised that under the circumstances he has a right to petition the court for advice in order that said petitioner as trustee may properly distribute the proceeds now in his hands and to releave him of any personal liability in this matter; your petitioner therefore prays that this court will take cognizance of the facts and advise him as to the proper distribution of the funds now in his hands as trustee under the above mentioned General Deed of Assignment for the benefit of the creditors; that counsel may be allowed reasonable fee for his services in this cause and your petitioner will ever pray, etc.

EARLE GARRETT,

Trustee under General Deed of Assignment for the benefit of the creditors from Mrs. Oeland R. Roman.

CALVIN W. BERRY,

Calvin W. Berry, *Counsel.*

16 *Memorandum.*

After recordation of deed and before goods on these premises were sold Waddill-Holland Company, landlord, levied distress warrant for rent and gave Trustee notice of this distress and of attachment for rent to become due.

Deed provides for payment of preferred claims in accordance with Bankruptcy Acts.

Waddill-Holland Company did not prove claim with Trustee but stands on its distress warrant and attachment.

Section 64 (Title II, Section 104, U. S. C. A.) of Bankruptcy Act provides, 1st, for payment of costs of administration and expenses of sale, 2nd, wages not to exceed $600.00 to each claimant (none claimed), 3rd, not applicable here, 4th, taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof, 5th, debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority, by applicable State laws. Rent claim restricted to rent owing for

actual use and occupation of premises which accrued within three months before date of bankruptcy.

In re distribution of assets of Roman's Restaurant

Earle Garrett, Trustee under Deed of Assignment, received from sale gross amount of		$1,680.80
Cost of Administration:		
Labor, Inventory, Marking goods, etc. preparatory to sale	$29.00	
C. Stuart Wheatley, Clerk, recording Deed of Assignment	6.60	
Postage Stamps, Notices to Creditors	2.10	
Brown & Garrett, Attorneys; Writing Deed of Assignment	25.00	
Trustee's Compensation, five per cent Commission	84.04	
	$146.74	
Expenses of Sale:		
Lavinder & Howze, painting sale signs	5.00	
J. D. Ley, Auctioneer	75.00	
Register Publishing Company, advertising	17.70	
Danville Printing Company, Handbills	5.50	
City of Danville, Lights	3.77	
	$106.97	
Balance (For distribution less cost of petition and proceeding in Corporation Court of Danville		$1,427.09
Rent claimed by Waddill-Holland Company, Incorporated		650.00

(If this claim is a valid lien it has priority.)

Next under Paragraph 4 of 64 Bankruptcy Act comes taxes legally due and owing by bankrupt to the United States or any States or subdivision thereof. Under this item, taxes due United States,

a. Compensation Tax, $281.09 + $5.19			$286.28
Federal Unemployment Compensation, Tax for 1940	$200.39		
With Interest from 12/2/41 to April 8, 1942		$4.39	
Federal Unemployment Compensation, Tax for 1941	71.70		
With interest from 2/1/42 to April 8, 1942		0.80	
	$281.09	$5.19	
b. Federal Insurance and Unemployment Tax, $66.45 + $2.36			$68.81
With interest on $58.48, a part thereof, from 8/15/41		$2.27	
With interest on $7.97 from 2/*/42		.09	
		$2.36	
c. State of Virginia Unemployment Compensation Commission $66.38 + $0.55			$66.93
With interest on $39.75, a part thereof, from May 1, 1941		$0.37	
1% per month until paid—And on $26.63 from August 1, 1941		.18	
		$0.55	
d. City of Danville, Taxes due			$300.55

If there is a balance it would be payable as *as* credit on Federal Housing Administration loan which is a debt due the United States of America amounting to $1,278.63—principal.

Deed of assignment

This general deed of assignment for the benefit of creditors made this 19th day of June 1941, by and between Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, Danville, Virginia, party of the first part, and Earle Garrett, Trustee, party of the second part, witnesseth:

That said party of the first part doth grant unto said party of the second part, trustee as aforesaid, all of the following described personal property located in the storehouse known as 510 Main Street, Danville, Virginia, heretofore used by the party of the first part in the conduct of a restaurant business under the trade name aforesaid, to wit:

All trade fixtures, one soda fountain and appliances, all restaurant and kitchen furniture, appliances and utensils, all plate and silverware, cash register, kitchen range and gas stove in kitchen, steam table in kitchen, two refrigerators, one combination water and milk cooler, coffee urns, electric sign, and all other tangible personal property located in said storeroom, or used in connection with said business, and all other assets of every kind and description now belonging to said party of the first part.

In trust, however, for the following uses and purposes,
19 to wit:

Said Trustee shall at once take charge and possession of all the property and assets hereby conveyed, make an inventory thereof, proceed to collect all choses in action, if any, and make sale of said property at public auction, after reasonable notice; provided that at least 10 days before such sale he shall mail a registered letter or notice to each of the creditors named in said deed, advising of the execution thereof, and stating therein the time, place and manner of sale, and the terms thereof, and stating also that this deed of assignment provides that acceptance hereunder by any creditor shall be in full satisfaction of his claim.

Said trustee shall, upon converting the above personal property and assets into cash, pay the cost of executing and recording this deed; the expenses of this trust, including a fee of $25.00 to Brown & Garrett, Attorneys, for drawing this deed of assignment, and five percentum to the trustee for his services hereunder, which is deemed to be reasonable compensation therefor.

Said trustee shall only recognize and pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof, if any, and those having a lien shall be preferred only to the extent of the value of the property upon which they have a lien. It being the intention of the party of the first part to provide for the expeditious settlement of this trust and to allow only

such preferences and priorities as are now required or allowed under the acts of Congress relating to bankruptcy. After paying all preferred and lien creditors, and after satisfying the landlord's lien for rent, the balance shall be distributed pro-rata among all creditors of said party of the first part, without preference or priority.

In the execution of this trust said trustee shall have all of the rights and authority, and be subject to all of the duties imposed by Chapter 213A of the Code of Virginia.

Creditors shall have 60 days from the date of the recordation of this deed within which to prove and file their claims before the trustee, and after such time said trustee shall have full power to make distribution to those creditors who have filed and proved their claims with him, and said trustee shall not be liable to any creditor who has failed or neglected to prove his claim within said period of 60 days, or before distribution is made by said trustee hereunder.

This assignment is made with the distinct understanding that all creditors of said party of the first part who accept the benefits of this trust do so in full satisfaction of their respective claims, and shall be forever barred from further recovery of any balance.

It is the intention of this deed to secure all creditors, whether listed hereunder or not. The names of the creditors of the party of the first part so far as is known are as follows:

Federal Housing Authority, Equitable Building, Baltimore, Md., Acct	$1,278.63
Patton, Temple & Williamson, Inc., Danville, Va.—Acct	216.18
W. L. Gibson, City Collector, 1939 Taxes due City of Danville; 1940 taxes due	117.24
Collector of Internal Revenue—Social Security tax (estimated)	54.08
Treasurer of Virginia—Unemployment Compensation liability (estimated)	63.64
National Outdoor Sign Co., Atlanta, Ga.—acct	79.50
American National Bank & Trust Company, Danville, Virginia, note endorsed by Isaac Harris and Moses Roman	332.00
Phillip Greenberg Market—account	110.00
City of Danville Water, Gas & Electric Depts	80.00
Waddill-Holland & Flinn, Inc., landlord—rent claim	109.26
Chesapeake & Potomac Telephone Co.	
Register Publishing Company—acct	21.00
S. Bumpert Co., Ozone Park, N. Y.—acct	43.45
Metro-Products Co., 57 Ellis St. N. E., Atlanta, Ga.—account	21.82
American National Bank & Trust Company, Danville, Virginia, two notes aggregating	9.00
	415.70
	$2,951.50

Witness the following signature and seal.

---------- ---- -- ------, [SEAL]

Doing business under the trade name of Roman's Restaurant.

21 STATE OF VIRGINIA,

City of Danville, to wit:

I, Eva W. Sneed, a Notary Public in and for the City of Danville, in the State of Virginia, do hereby certify that Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, whose name is signed to the foregoing writing bearing date the 19th day of June, 1941, has acknowledged the same before me in my city and state aforesaid.

My Commission expires February 20, 1945.

Given under my hand this 19th day of June, 1941.

——— ———, *Notary Public.*

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

Western District of Virginia

ROANOKE, VA.

AUGUST 7, 1941.

Re: Mrs. Oeland R. Roman, T/a Roman's Restaurant,
Danville, Va.

MR. EARLE GARRETT,

Attorney at Law, Danville, Virginia.

DEAR MR. GARRETT: I have received from Mr. N. B. Early, Jr., Collector of Internal Revenue, copy of your letter of July 24, 1941, in regard to attachments for rent on proceeds of the sale of property of the above-named assignor in your hands.

I understand that Mr. Early has heretofore filed with you a proof of the claim of the United States covering Federal Insurance Contributions and Unemployment Tax.

The government claims that its tax debt takes priority over landlord's lien for rent. I call your attention to the following authorities:

31 U. S. C. A. 191, 192.

42 U. S. C. A. 1101, 1102.

U. S. v. Oklahoma, 261 U. S. 253.

22 U. S. v. Butterworth, 269 U. S. 504.

Hatch v. Morasco Holding Co., 661 F. (2d) 914 (*certiorari* denied, 288 U. S. 613).

Thelusson v. Smith, 2 Wheat. 396.

North River Coal Co. v. McWilliams Brothers, 59 F. (2d) 797.

New York v. McClay, 288 U. S. 290.

You will observe that Section 192, of 31 U. S. C. A., places upon you personal liability in the event you do not give to the claim of the United States the priority to which it is entitled.

Very truly yours,

R. R. RUSH,
R. Roy Rush,
Assistant United States Attorney.

Copy to:
Honorable N. B. EARLY, Jr.,
Collector of Internal Revenue, Richmond, Virginia.

COMMONWEALTH OF VIRGINIA

OFFICE OF THE ATTORNEY GENERAL

RICHMOND

JULY 29, 1941.

Re Mrs. Oeland R. Roman, Trading as Roman's Restaurant

Mr. EARLE GARRETT,
Attorney-at-Law,
Masonic Building, Danville, Virginia.

DEAR MR. GARRETT: I enclose herewith proof of claim in the amount of $66.38, with interest on $39.75 from May 1, 1941 at the rate of one percent per month until paid and on $26.63 from August 1, 1941 at the rate of one percent per month until paid.

I have received your letter of July 24, 1941, in which you state that the landlord has served a distress warrant upon you as trustee for $250.00 a month rent from April 1, 1941 to July 1, 1941 and also that an attachment has been issued for $650.00 additional rent. I note that you have in your hands $1,670.65 for distribution subject, of course, to administrative charges.

Since the tax due the Unemployment Compensation Commission is, by virtue of the provisions of Section 1887 (106c) of the 1940 Supplement to the Virginia Code; entitled to priority over "all claims of lien and general creditors" of course it makes no difference to me what the judgment of the Trial Justice may be with respect to the attachment and the distress warrant because any lien obtained by the landlord would be subsequent to the statutory lien for the tax due the Commission. You will note in the above section of the Code referred to that the last part of that Section is as follows:

"Nor shall anything herein be construed to affect the priority of any mortgage, deed of trust, or other lien duly perfected prior to the date the contributions or any part thereof first accrued."

It will be noted from the proof of claim which I am forwarding to you that the contributions or taxes due to the Commission first accrued in January, 1941, and, therefore, prior to any possible lien for rent.

Even under Section 64 (1) of the Bankruptcy Act the taxes due the Commission would have priority over the rent. You will note that the section of the Unemployment Compensation Act referred to above is similar to Section 429 of the Tax Code prior to the time it was amended. The United States Circuit Court of Appeals in the case of Grant v. Snead, 37 Fed. (2) 705 held that under Section 429 of the Tax Code of Virginia that taxes were ahead of an inchoate lien for rent. You, of course, are familiar with the case of American Exchange Bank v. Goodloe Realty Corporation, 135 Va. 204, 116 S. E. 505, in which it was held "in this State the only methods by which the landlord can obtain a lien for rent, prior to a judgment and an execution therefor, is by distress warrant or attachment levied on the property liable for rent, while it is on the leased premises or within thirty days from its removal therefrom. See Chapter 222 Section 6416 of the Code. Until a lien is thus obtained the landlord's right to a lien is inchoate in this State."

I will be glad if you will advise me whether or not you agree with me that the taxes due this Commission have priority over the rent either for six months or three months and that any
24 judgment that may be entered by the Trial Justice or any Court for such rent will be subordinate to our claim for taxes.

With respect to the interest rate of 1% per month you are referred to the case of U. S. v. Childs, 266 U. S. 304, 45 Supreme Court Reporter 110, which holds that no part of the 1% interest is a penalty. This, however, only applies to bankruptcy and I don't suppose anyone would dispute the fact that under Section 1887 (106) (a) past due taxes due the Unemployment Compensation Commission bear interest at the rate of 1% per month from the due date until payment.

Very truly yours,

KENNETH C. PATTY,
Kenneth C. Patty.
Assistant Attorney General,
Box 1358.

kcp: mkc
enclosure.

COMMONWEALTH OF VIRGINIA

OFFICE OF THE ATTORNEY GENERAL

RICHMOND

JULY 3, 1941.

Re Mrs. Oeland R. Roman, Trading as Roman's Restaurant, Danville, Va.

Mr. EARLE GARRETT,
Trustee,
618 Masonic Building, Danville, Virginia.

DEAR MR. GARRETT: Reference is made to your letter of June 26, 1941 to the Unemployment Compensation Commission of Virginia, advising that Mrs. Oeland R. Roman, trading as Roman's Restaurant, has executed a deed of assignment to you as trustee.

I desire to call your attention to Section 14 (c) of the Virginia Unemployment Compensation Act, copy of which is enclosed herewith, which reads as follows:

"Priorities under legal dissolutions or distributions.—In the event of any distribution of any employer's assets, contributions then or thereafter due shall be paramount and prior to all claims of lien and general creditors, except claims given higher dignity by Federal Law. Nothing in this section shall be construed in derogation of any lien of the Commonwealth or any of its political subdivisions now existing or hereafter created by law; nor shall anything herein be construed to affect the laws now in force with regard to marshaling a decedent's estate and in regard to the exemption of a poor debtor; nor shall anything herein be construed to affect the priority of any mortgage, deed of trust or other lien duly perfected prior to the date the contributions or any part thereof first accrued."

Under this section the taxes due the Unemployment Compensation Commission have priority over all claims of lien and general creditors except mortgages and deeds of trust and other liens duly perfected prior to the date any part of the tax first accrued. Of course, you will ascertain the status of the other claims and see to it that the claim for taxes under the Unemployment Compensation Act is satisfied in full before any distribution is made to the other creditors.

I am having the Auditing Department of the Commission furnish me with a statement showing the amount of tax due by this concern and as soon as that information is received, I will have

prepared and executed by the Commission a formal proof of claim and will mail it to you.

Very truly yours,

KENNETH C. PATTY,
Kenneth C. Patty,
Assistant Attorney General,
Box 1358.

kcp: mkc.

In Corporation Court of City of Danville

Second petition

To the Honorable HENRY C. LEIGH, *Judge of said Court:*

Your petitioner, Earle Garrett, shows unto the Court as follows:

That he has heretofore filed a petition in Your Honor's
26 Court for the purpose of obtaining the advice of the Court as to the proper manner of distributing the proceeds now held by said Trustee in the matter of Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant.

That your petitioner has since been advised and herewith alleges that it would be to the interest of all parties concerned that said petition be treated as a bill in chancery and that the Court render a declaratory opinion setting forth the respective rights and liabilities of the parties to said petition.

That, therefore, your petitioner has obtained the written consent of both the general creditors and also those claiming priority, as shown by written statements attached hereto, with the exception of Waddill, Holland & Flinn, Incorporated, trading as Hotel Burton, S. Gumpert Company, Incorporated, and National Outdoor Sign Company.

Your petitioner, therefore, prays that the petition may be treated as a bill in chancery; that proper process may issue; that the parties set out above may be made parties plaintiff and defendant respectively under the name as above set out; that the said defendants be required to file their respective answers to said bill, but answer under oath is hereby waived; that said Court may render a declaratory opinion setting forth the respective rights and liabilities of all parties to this action and advise the Trustee herein as the proper manner of distributing the proceeds now in his hands as Trustee; that a reasonable fee be allowed Counsel for his services in connection with the preparation of this suit; and that your petitioner may be given such other, further and general relief in

the premises as the nature of the case may require and to equity may seem meet.

And your petitioner will ever pray, etc.

EARLE GARRETT,
Trustee under General Deed of Assignment from Mrs. Oeland R. Roman, trading as Roman's Restaurant.
CALVIN W. BERRY, *Counsel.*

27 In Corporation Court of City of Danville

Answer of Waddill, Holland & Flinn, a partnership trading as Hotel Burton

The answer of W. W. Waddill, C. G. Holland, and C. M. Flinn, a partnership trading as Hotel Burton, for answer to the petition, or so much thereof as it is advised it is necessary to answer, filed by Earle Garrett, Trustee, in the above-styled cause, answering, says:

This respondent admits that it refused to come in under the general deed of assignment, as alleged in said petition, and that it asserts a claim as landlord for $1,500.00 for rent due and to become due by virtue:

1. Of a distress warrant for $850.00 for rent due as of July 1, 1941, said distress warrant levied as of said date of July 1, 1941.

2. And for $650.00 for rent claimed under attachment issued by the Civil Justice of Danville, July 2, 1941, and duly levied on said date of July 2, 1941.

This respondent claims priority by virtue of the levy of said attachment and distress warrant over all other claims of whatsoever nature against the funds now held by Earle Garrett, Trustee, which said funds are the proceeds of sale of property on said premises leased by this respondent to Mrs. Oeland R. Roman, and the sale having been made after levy of said distress and attachment.

And now, having fully answered said petition, respondent prays to be hence dismissed with its reasonable costs by it in this behalf expended.

W. W. WADDILL,
C. G. HOLLAND,
C. M. FLINN,
A partnership trading as Hotel Burton,
Respondent.

CREWS & CLEMENT.

In Corporation Court of City of Danville

The Unemployment Compensation Commission of Vir-
28 ginia, an instrumentality of the Commonwealth of Virginia, by the Attorney General, reserving unto itself all just exceptions to the petition filed in this cause, this day appeared and tendered its answer to said petition and asked leave to file the same, which leave of Court is hereby granted, and said answer is accordingly filed.

Answer of Unemployment Compensation Commission of Virginia

(Filed April 28, 1942)

The Unemployment Compensation Commission of Virginia, for answer to the petition, or so much thereof as it is advised it is necessary to answer, filed by Earle Garrett, Trustee, in the above styled cause, answering, says:

1. That Respondent is an instrumentality of the Commonwealth of Virginia.

2. That Respondent, on behalf of the Commonwealth of Virginia, is required to levy and assess payroll taxes on all wages paid by employers to individuals in their employment as defined in the Unemployment Compensation Act of Virginia.

3. That from January 1, 1941, to the date the assignment mentioned in the petitioner's bill, Mrs. Oeland R. Roman, trading as Roman's Restaurant, was an employer under said Unemployment Compensation Act and that tax in the principal amount of $66.38, with interest at the rate of one per centum (1%) per month on $39.75, a part thereof, from May 1, 1941, until paid, and with interest at one per centum (1%) per month on $26.63, the residue thereof, from August 1, 1941, until paid, and that no part of said tax or the interest thereon has been paid to this respondent.

4. Respondent, further answering says, that, in this instance it is not disputed by respondent that the tax due N. B. Early, Collector, and the debt due The Federal Housing Administrator have priority over the taxes due this respondent and the City of Danville. (Section 3466 of the United States Revised Statutes; Spokane County v. United States, 279 U. S. 90.)

5. Respondent, further answering says, that a part of the taxes due respondent first accrued on January 1, 1941, and that said claim for taxes has priority over all claims for taxes in favor of the City of Danville, and avers and alleges that the taxes claimed by the City of Danville were not duly perfected liens against any of the assets of the Assignor on January 1, 1941.

6. Respondent, further answering avers and charges that
29 the claim asserted by Waddill-Holland Company, for rent, was not a lien against the assets and property of the Assignor on January 1, 1941, and, therefore, the claim of respondent for taxes has priority over said landlord's claim. (Section 1887 (106) (c) Virginia Code Supplement 1940, as amended, Acts of General Assembly, 1942, Chapter 317, effective March 30, 1942).

And now, having fully answered said petition, respondent prays that to be hence dismissed with its reasonable costs by it in this behalf expended.

UNEMPLOYMENT COMPENSATION
COMMISSION OF VIRGINIA,
Respondent.

KENNETH C. PATTY,
Kenneth C. Patty,
Assistant Attorney General of Virginia,
Counsel for Respondent.

In Corporation Court of City of Danville

On motion of the United States, made by Henry T. Clement, Assistant United States Attorney for the Western District of Virginia and for good cause shown the United States is dismissed as a party plaintiff to this action and is given leave to file its answer herein as a party defendant which is accordingly done.

Answer of United States

Filed May 9, 1942

The answer of the United States to a Bill of Complaint filed against it, and others, in the Corporation Court of the City of Danville, Virginia, by Earle Garrett, Trustee, and others.

This respondent reserves to itself the benefit of all just exceptions to the said Bill of Complaint, for answer thereto or to so much thereof, as it is advised that it should answer, *answer* and says:

Respondent admits the allegations contained in the Bill of Complaint.

The United States is not bound or required to file, within
30 sixty days, its claim for payment of debt with Earle Garrett, Trustee. Your respondent further avers that its claim in the amounts set-forth in the Bill of Complaint, should be paid first out of funds in the hands of the Trustee, after the payment of the cost of administration; that under the provisions of Section 3466 of the Revised Statutes (31 USC 191) the payment of your respondent's claim is fixed by statute.

And now having fully answered the complainants' bill, your respondent prays to be hence dismissed with his cost in this behalf, expended.

UNITED STATES
By HENRY T. CLEMENT,
Henry T. Clement,
Assistant United States Attorney.

In Corporation Court of City of Danville

Stipulation as to certain facts

Whereas the Honorable Henry C. Leigh, Judge, has addressed a letter to counsel for Earle Garrett, Trustee, requesting certain information with reference to the following facts:

(1) The date on which the Trustee took possession of the property;

(2) The date on which the Trustee sold said property at auction;

(3) The date on which the attachment of the landlord for future rent was levied;

(4) The date on which the levy was made for the City of Danville for taxes due;

(5) The date on which the tenancy of Mrs. Ola R. Roman, trading as Roman's Restaurant, begin;

(6) Whether or not the landlord has regained possession of the premises within the period for which future rent was claimed;

(7) The reason why the attachment of the landlord was not pursued;

(8) Necessary exhibits from the tax books to show what property was assessed by the City of Danville;

Whereas all of this information is a matter of record except with reference to the stipulation between Earle Garrett, Trustee under Deed of Assignment, and Grasty Crews, Counsel for the landlord, it is deemed advisable in order to save unnecessary
31 expense that a stipulation between counsel be entered into setting forth the information requested by the Court instead of having an order of reference and further depositions;

It is therefore stipulated that the following are the true facts and it is further stipulated and agreed that they be incorporaetd and made a part of the record in this case:

(1) The trustee took possession of the property June 19, 1941.

(2) The trustee sold the property at auction July 12, 1941.

(3) The attachment of landlord for future rent was levied 1st July, 1941.

(4) The levy of City for taxes was made 2nd July, 1941.

(5) Mrs. Roman's tenancy began 1st Jan. 1937, term of 5 years at $250.00 per month.

(6) Has landlord regained possession of premises within period for which future rent was claimed?

The Trustee turned the keys over to the landlord shortly after July 12, 1941. Attempt was made to rent the property but it has not been rented, but has been continuously vacant since the day that it was vacated by Roman's Restaurant.

(7) The attachment was not pursued because Earle Garrett, Trustee entered into a stipulation with counsel for the landlord in order to save costs by virtue of which the sale could proceed despite the levy of distress warrant and levy of the attachment without losing any rights by the landlord as to the lien on the property sold for either the attachment or the distress warrant.

(8) Exhibits from Tax Books to show what property was assessed by City. These have been procured by the Trustee and are now in his possession and will be attached to this stipulation and made a part thereof.

EARLE GARRETT, *Trustee.*
By CALVIN W. BERRY, *His Counsel.*
GRASTY CREWS, *Counsel for Waddill, Holland & Flinn, Incorporated, Landlords.*

UNITED STATES.
By HENRY T. CLEMENT,
Henry T. Clement,
Assistant United States Attorney.

32 UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA, *Respondent.*
By KENNETH C. PATTY,
Kenneth C. Patty,
Assistant Attorney General of Virginia, Counsel for Respondent.

CITY OF DANVILLE,
By E. WALTON BROWN,
E. Walton Brown, *City Attorney.*

In Corporation Court of City of Danville

Re Earle Garrett, Assignee of Mrs. Oeland R. Roman, Trading as Roman's Restaurant.

Opinion

November 19, 1942

The facts appearing from the pleadings in the cause and the stipulations of Counsel are these:

On June 19th, 1941, Assignor executed and delivered to the Trustee a deed of assignment for the benefit of her creditors,

which was duly admitted to record on the same date. By it she transferred and assigned all of the property owned by her which was used in connection with the business which she conducted under the style of Roman's Restaurant.

The deed of assignment contains this provision:

"Said trustee shall only recognize and pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof, if any, and those having a lien shall be preferred only to the extent of the value of the property upon which they have a lien. It being the intention of the party of the first part to provide for the expeditious settlement of this trust and to allow only such preferences and priorities as are now required or allowed under the acts of Congress relating to bankruptcy. After paying all preferred and lien creditors, and satisfying the landlord's lien for rent, the balance shall be distributed pro rata among all creditors of said party of the first part without preference or prioity."

Assignor's place of business was leased from Waddill-Holland and Flinn, Inc. The rent in question was reserved by contract. The lease was for a period of five years beginning January 1st, 1937.

The property assigned remained on the leased premises
33 and was sold by the Trustee on July 12th, 1941, without being removed therefrom by him.

The United States claims priority under Section 3466 R. S.; Title 31, U. S. C. A., Sec. 191, for Federal Unemployment Compensation Taxes for the year 1940 in the sum of $209.30, with interest thereon from December 2, 1941, at the rate of six per centum per annum. And for a like tax incurred in 1941 in the sum of $71.70, with like interest from February 1, 1942.

The United States also claims priority in the sum of $1,278.63, with interest at six per centum per annum from March 2, 1941. This claim arose out of a transaction of the Federal Housing Administration and accrued to the government on March 2, 1941.

Virginia Unemployment Compensation Commission claims priority over the landlord's rent claim and the City of Danville's claim for taxes, but concedes priority to the federal government. Its claim is based on taxes on the wages of the Assignor's employees paid prior to the delivery of the deed of assignment, and is in the sum of $66.38, with interest on $39.75 thereof at the rate of one per centum per mensem from May 1, 1941, and on $26.63, with like rate of interest from August 1, 1941, until paid.

On July 1, 1941, the landlord had issued and levied on the property assigned a warrant for distress for three and two-fifths months' past due rent amounting to $850.00.

On July 1, 1941, the Landlord had issued and levied on the same property an attachment for future installments of rent due under its contract of lease. The amount claimed being $650.00 and covering rent to become due for two and three-fifths months. Through agreement between the Attorney for the Landlord and the Trustee no effort was made to sell the property distrained or levied on under the attachment; the Trustee was allowed to sell and hold the proceeds subject to the rights of the parties under the levies. By like agreement no judgment was entered on the attachment. Apparently it was assumed that the Landlord's claim for past due and future rent was correct and that the only question was one of liens or priorities.

For the years 1939, 1940 and 1941, the City of Danville assessed the "Furniture and Fixtures" of "Roman's Restaurant", "510 Main Street" at $2,500.00. And on July 2nd, 1941, the City Collector, authorized by the City's charter so to do, distrained all of the property on the leased premises for taxes due the City of Danville as follows: for the year 1939 on furniture and fix-
34 tures and merchants' capital in the sum of $117.24; for the year 1940 on the same in the sum of $57.68, and for the year 1941 on same in the sum of $52.79, a total tax for the three years involved on the furniture and fixtures and merchants' capital of the Restaurant of $226.81. At the same time he distrained on the same property for taxes assessed on other personal property of the Assignor as follows: for the year 1939, $31.19; for the year 1940, $22.95 and for the year 1941, $20.50, a total of $74.64, the aggregate amount distrained for being $300.55.

Assignee delivered possession of the demised premises to the Landlord shortly after July 12, 1941. But I gather from the stipulation that this was done in an effort to reduce the loss by enabling the Landlord to make a lease, if possible, and not with the thought that the Landlord waived its right to the future installments of rent becoming due within the six months specified by the Virginia Statute, except to the extent that rent might have been received during the remainder of that period. No disposition was made of the premises during that time, nor did the Landlord make any use of them or receive any benefit from them.

After deduction of administrative costs already incurred there remains in the hands of the Assignee the sum of $1,407.29. This amount will be further reduced by the costs etc. of this suit. In any event, the funds to be distributed by the trustee will be insufficient to satisfy either the Landlord's claim or that of the United States in full.

With the foregoing facts as the basis of decision, the question is, whether the United States is entitled to priority in distribution. In view of the possibility of personal liabilty on the part

of the Assignee to both the Federal Government under its statutes and to the Landlord under the Virginia Statutes, and the decisions of its court of last resort, the Assignee was placed in a precarious position, and it may be said in passing that a judicial determination of the questions presented was essential, and that, therefore, the expenses incident to the litigation were justifiably incurred. See these Virginia decisions: American Ex. Bank v. Goodlee Realty Corp., 136 Va. 204; Allen v. Parkey, 154 Va. 739 and Kelly v. Worsham, 160 Va. 275.

The right of the United States to priority is fixed at the date of the delivery of the deed of assignment. United States v. Oklahoma, 261 U. S. 253; 43 S. Ct. 295; 67 L. Ed. 638. The claim of the Federal Housing Administration is a claim of the United States. U. S. v. Summerlin, 310 U. S. 414; 60 S. Ct. 1019.

The United States contends that because the Landlord had not levied its distress warrant and attachment until after the date of the delivery of the deed of assignment that its lien for rent was inchoate and, therefore, subordinate to its claim.

Reservations of opinion made in the cases of New York v. McClay, 288 U. S. 290; 46 S. Ct. 176, and United States v. Texas, 62 S. Ct. 350, are so sharply pointed as to cast grave doubt upon the conclusion that the claim of the National Government is inferior to that of any lienor, regardless of what form of lien he holds. It is plain that in order that one holding a lien be satisfied in preference to the United States that his lien must be specific and perfected. Spokane County v. U. S.; New York v. McClay; U. S. v. Texas, supra; U. S. v. Knott, 298 U. S. 544, 56 S. Ct. 902, and U. S. v. Emory, 62 S. Ct. 317.

In U. S. v. Knott, supra, this language is quoted from the opinion in the case of Thellusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271.

"The United States are to be first satisfied, but it then must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi. fa., the property is devested out of the debtor, and cannot be made liable to the United States."

The quoted language has been a recurring theme in subsequent cases. Close analysis of it would leave the lienholder who comes in conflict with the claim of the United States to priority but little comfort. Taken at its face value it would seem that a species of ownership alone would be sufficient to prevail against the United States. See McClay case, supra, where the charactgristics of a mortgage are discussed. Again the seizure of the property under the writ of fi. fa. as distinguished from the lien arising when it

comes into the officer's hands, the case in Virginia, seems to be made the test. The opinion in the Knott case, supra, without holding that the claim of the United States would be inferior to that of a deed of trust creditor or mortgagee goes on to say that at the least the claimant in opposition to its right of priority must have a specific and perfected lien. Howbeit, answer is called for, and decision must here be made. I conclude that if the Landlord had a specific and perfected lien that it had priority over the claim of the United States. Careful reading of the opinions in the cases of Conrad v. Atlantic Ins. Co., 1 Pet. 386; 7 L. Ed. 189, and Brent v. Bank of Washington, 10 Pet. 596; 9 L. Ed. 547,
36 shows that those decisions did not go quite so far as that in the Thellusson case. In Brent v. Bank, supra, at pages 553, 554, the opinion is expressed that the priorities must be paid out of what comes into the assignee's hands for distribution; that he takes the thing subject to the charge of the lien and that the priorities are applicable to the remnant only.

Then, it must be determined whether under Virginia Law that the Landlord is given a specific and perfected lien for six months' rent accrued and to accrue. Confusion has arisen by reason of expressions in the opinion in the case of American Ex. Bank v. Goodlee Realty Corporation, supra, to the effect that until distraint is made or attachment levied the landlord's lien is inchoate. Although I fully appreciate my temerity in disagreeing with conclusions of the learned and exceedingly painstaking Judge who wrote that opinion, I think it plain that so far as this point was involved, that what he had to say was dictum. Judge Sims was merely extending a courtesy to counsel in answering argument advanced. What he said was not necessary to the decision of the issue made. It is true that the case of Bird v. City of Richmond, 240 Fed. 545, sustains his view of the matter, but as I read it the decision in the case of Anderson v. Henry, 45 W. Va. 319; 31 S. E. 998, is exactly to the contrary. In this connection see the construction placed upon this opinion in In re McIntire, 142 Fed. 593. It is also cited in American and English Encyc. of Law, Vol. 18, p. 332, 2nd Ed., in support of the text reading as follows: "In many jurisdictions the statutes give to the landlord alien on the chattels of the tenant placed on the demised premises."

The opinion in the case of Bradford v. Graham, 287 Fed. 686, contains an able and comprehensive discussion of the Virginia Statutes. What was said in Bird v. City of Richmond, supra, was held to be dictum. The holding in this case clearly is that Sections 5523 and 5524 of the Virginia Code give the landlord a specific and perfected lien. True it is that in that case the landlord was accorded priority under the provisions of Section 64 of

the Bankruptcy Act, but the point under discussion was whether the landlord had a lien which was specific and perfected without distress. The statement found in Burks' Pleading and Practice which was cited in American Ex. Bank v. Goodlee, supra, was considered, and doubt expressed as to its correctness. The case of Geiger v. Harman, 3 Grat. (44 Va.) 130, was the basis for what was said in Burks' Pleading and Practice. This was said in the opinion in that case:

37 "Although the landlord's right to distrain the goods and chattels of his tenant, continues, in some cases, where the said goods and chattels have been removed from the demised premises, yet, the Court is of opinion that the landlord's lien for a year's rent, on the goods and chattels of his tenant, does not extend to protect them from being taken by virtue of any execution, except in cases where the said goods and chattels shall be in, or upon the demised premises."

I fail to see wherein it can be successfully contended that the quoted language affords any good ground for argument that the landlord does not have a lien except in cases where he has actually levied or distrained. Indeed, the import seems to be entirely different and plainly to be that where the goods and chattels are on the demised premises that the landlord has a lien for a year's rent regardless of distraint or levy; a lien which may be lost, however, to that of an execution creditor when the goods have been removed from the demised premises. Since that opinion was written the statute has been amended so that levy or distraint within thirty days after the removal of the goods is given the same effect as if made while they were on the demised premises. This case is also cited by the author of the article on Landlord and Tenant found in American & Eng. Encyc. of Law, supra.

The point in question is also considered in the case of Lott v. Salsbury, 237 Fed. 191. In the opinion it was held that the landlord was given a lien specific and perfected without distress—such a lien as falls within the provisions of Section 67 of the Bankruptcy Act. It quotes as being conclusive of the question from the opinion of Chief Justice Chase in In Re Wynne, 30 Fed. Cases 752, as follows:

"We cannot doubt that this statute creates a lien in favor of the landlord and a lien of high and peculiar character. We have no concern with the policy of this legislation. It is upon the statute books and the lien so created must be respected and enforced. Would it not be trifling with the plain sense of words to say there is a lien under the trust and a lien under the execution, but the claim which by law is made superior to either is no lien?"

And it seems to me that the last sentence of the quotation is the complete and irrefutable answer to the question. Can a deed of trust creditor, or the assignee in a deed of assignment for the benefit of creditors, who under Virginia law are purchasers for value pro tanto (Merchants Bank v. Ballou, 98 Va. 112), and who, therefore, stand in the most favorable position, be subordinated by force of the statute to the landlord's claim, and yet it be said that the landlord has no lien? Certainly, none so far as the claim of the United States is concerned, could conceivably occupy any stronger position than the deed of trust creditor does in Virginia. But as to the goods and chattels of the tenant his position is inferior to that of the landlord. It would be a strange rule which accorded priority to the deed of trust creditor over the claim of the United States and yet denied it to the landlord when the deed of trust creditor is by positive enactment postponed to the landlord's claim.

38

Advertising to the necessity of levy or attachment in order that the landlord may acquire a specific and perfected lien, let us briefly consider Section 5524 of the Virginia Code. At common law the landlord had a right of distress. Plainly there was no intent to take this away from him. The legislation bettered his position. True it is that his common law right to levy the distress himself has been abolished; that certain prerequisites have been prescribed in order that he might distrain his tenant's goods. Some protection was afforded the tenant, but in the final analysis the landlord's position was strengthened. He was provided a summary method for reducing the tenant's goods to money, whereas at common law he merely had a right of detainer. If he was not given a lien by the terms of Section 5524 instead of the mere right to obtain a lien by distress which he had always had, I fail to perceive the reason for the enactment of Section 5524. The opinion in the case of Anderson v. Henry, supra, in its discussion of the West Virginia Statutes, which are in substance the same as those of Virginia ably discusses this phase of the question, and holds that they gave the landlord a lien without levy of distress. I think that in Virginia the landlord is given a lien without distress, as long as the tenant's goods remain on the premises; that the distress, or attachment, in case of future installments of rent, is but the means for enforcing the lien. Confusion seems to have arisen in the distinction between a lien and the remedy for its enforcement. At this day almost all types of lien carry as an incident thereto some method of enforcement, or reducing the thing subject to the charge to money. The point is discussed and the distinction forcibly illustrated in the case of Jas. Morgan v. George W. Campbell, 22 Wall. 381; 22 L. Ed. 796,

where in discussing the Illinois statutes relating to the landlord's lien the Court said: why give the lien if it must be required
39 by distress? That right (distress) had already been given. And the opinion held that as the law then was in Illinois the statute gave a lien; the distress was a means for enforcing it. Of course, the lien may be lost if distraint be not made within the time limits set, but from that it does not follow that conditions precedent were to be met in order that the lien be obtained. Here it is to be noted that distress was had and attachment levied while the goods were on the demise premises. See the case of Jones v. Fidelity & Columbia Trust Co., 73 Fed. (2d) 446, construing Kentucky statutes and holding that they create a lien; that distress is not necessary to its creation, but that failure to levy it within the prescribed periods may result in its divestment.

In Virginia the landlord's lien relates to no particular period of the tenancy, but goes back to its beginning. Wades v. Figgatt, 75 Va. 575. Therefore, the fact that the claim of the United States may have come into existence prior to the time that a part of the rent in question became due the landlord is of no moment.

By Acts of 1940, Chap. 340, Sec. 14c of the Virginia Unemployment Compensation Act was amended to the effect that contributions then or thereafter due shall be paramount and prior to all claims of lien and general creditors, except claims given higher dignity by Federal law, but the section closes as follows: "nor shall anything herein be construed to affect the priority of any mortgage, deed of trust, or other lien duly perfected prior to the date the contributions or any part thereof first accrued." Due to this amendment the decision in the case of W. T. Grant Co. v. Snead, et al., 37 Fed. (2d) 705, has no special bearing on the case. The tenancy having begun long prior to the accrual of the claim of the Commonwealth, the lien of the landlord is prior in time to the claim of the Commonwealth. Wade v. Figgatt, supra. And from what has preceded it follows that in my opinion the landlord's claim is superior to Virginia's.

My conclusion is that as to $222.31 of its claim the City of Danville has priority over both the landlord's lien and that of the United States. That is the amount assessed against "Roman's Restaurant" on its "furniture and equipment", less the tax assessed on its Merchants' Capital, which was $1.50 for each of the three years in question. Section 5524 subordinates the landlord's lien to the lien of taxes. A tax assessed against a specific chattels is a paramount lien thereon and follows it wherever it may be. Chambers v. Higgins, 169 Va. 345; Baugh & Sons v. Drewry,
40 150 Va. 334. The concrete question then is this: were the taxes assessed against the "Furniture and Equipment" of

"Roman's Restaurant", "510 Main Street" assessed against a "specific chattel" or chattels. My search has *lead* me to no authority on the subject, but I think there is an analogue to be found in cases dealing with the sufficiency of the description of property conveyed by chattel mortgages. See Williamson v. Payne, 103 Va. 551. Following that analogy the City would have a specific and perfected lien. The furniture and equipment assessed for taxation had a definite situs and was used in the conduct of a specific business, and I think that it should be regarded as a unit as far as the assessment is concerned. So long as they remained on the premises where the owner's business was conducted, I think they fell within the fair intendment of the Virginia Statutes discussed in the cases last cited. Had they been divided and removed therefrom no doubt different results would have followed. The City's charter gives it the same rights to a lien for taxes as are given the Commonwealth in its Tax Code. See City Charter, Chapter 9, Sec. 1.

The provisions of the deed of assignment contemplate distribution of the proceeds of sale of the property assigned in accordance with the provisions of the Bankruptcy Act. The right of the United States cannot be affected by such provisions. U. S. v. Emery, supra. Nor can those of a lienholder who does not come in under the deed of assignment. Nor do I think that a lienholder is thereby deprived of his rights under State law and required to surrender his lien. To so hold would be in effect to allow a preference of nonlienholders, which is prevented by Section 5278b of the Code of Virginia. Aside from the right to prefer given by local law, which might be exercised in accordance with the bankruptcy law, its provisions cannot control in proceedings in State Courts.

A decree will be entered in accordance with the views herein expressed. Consideration should be given in preparing it to costs and expenses in connection with the present litigation.

HENRY C. LEIGH, *Judge*.

Nov. 19, 1942.

In Corporation Court of City of Danville

Decree

January 5, 1943

41 This cause which has been regularly matured and set for hearing came on this day to be heard upon the separate answers of the United States of America, Unemployment Compensation Commission of Virginia and Waddill, Holland & Flinn, Inc.; and upon the stipulation of facts agreed to by Waddill,

Holland & Flinn, Inc., United States of America, Unemployment Compensation Commission of Virginia and the City of Danville, and was argued by counsel:

Upon consideration whereof it appearing to the Court that the funds now remaining in the hands of the Assignee for distribution among the creditors of Oeland R. Roman, trading as Roman's Restaurant, are insufficient to pay the claim of either the United States of America or Waddill, Holland & Flinn, Inc., in full, and the Court being of the opinion for the reasons set forth in a written opinion filed in this cause and made a part of the papers therein, that the rent claim of Waddill, Holland & Flinn, Inc., is entitled to priority over the claims of the United States of America and the Unemployment Compensation Commission of Virginia, but that it is subordinate to the claim of the City of Danville for taxes in the sum of $222.31, doth so decide; and

The Court doth therefore adjudge, order and decree that Earle Garrett, Assignee, do out of the funds in his hands remaining, after first paying the costs of this suit; any expenses in connection with the execution of his trust yet remaining unpaid; and an attorney's fee to Calvin W. Berry, Esquire, of $100.00 for his services in instituting and conducting this suit, pay the aforesaid sum of $222.31 to the City of Danville; and the residue thereof to Waddill, Holland & Flinn, Inc., to be credited on its claim for rent.

And the United States of America by its counsel having objected and excepted to the entry of this decree and having intimated to the Court its intention to apply to the Supreme Court of Appeals of Virginia for an appeal to this decree, said Assignee is hereby directed and ordered to withhold payment of the amounts hereby decreed to be paid to the City of Danville and Waddill, Holland & Flinn, Inc., until the expiration of four months from the entry of this decree, and if prior to that time no petition has been filed for an appeal, shall forthwith disburse the funds in his hands in accordance with the terms hereof, and if an appeal be granted he shall withhold payment until the disposition thereof by the appellate court.

When payment is made he shall report same to this court with proper receipts covering the same.

And this cause is continued.

42 In Corporation Court of City of Danville

Clerk's certificate

I, C. Stuart Wheatley, Clerk of the Corporation Court of Danville, do hereby certify that the foregoing is a true transcript of so much of the record and judicial proceedings of said Court as I have been directed to copy, together with the original exhibits

hereto annexed, in a certain suit in equity lately pending in said Court between The United States of America, et als., plaintiffs, and Waddill, Holland & Flinn, Inc., et als., defendants.

And I further certify that The United States of America, (originally a party plaintiff in said suit but subsequently dismissed as a party plaintiff and made a party defendant) one of the defendants, has filed with me written notices to Waddill, Holland & Flinn, Inc., City of Danville, Unemployment Compensation Commission of Virginia and Earle Garrett, Trustee, of her intention to apply for a transcript of said record, which notices show on their faces to have been accepted by Crews & Clement, Attorneys for Waddill, Holland & Flinn, Inc., by E. Walton Brown, Attorney for City of Danville, by Kenneth C. Patty, Attorney for the Unemployment Compensation Commission of Virginia, and by Calvin W. Berry, Attorney for Earle Garrett, Trustee.

Given under my hand this 28th day of April, 1943.

C. STUART WHEATLEY, *Clerk*.

Clerk's Fee for Record $12.50.

(No part of which represents tax due the State of Virginia.)

A Copy—Teste:

M. B. WATTS, *C. C.*

43 In Supreme Court of Appeals of Virginia

Richmond

UNITED STATES OF AMERICA, ET AL.

v.

WADDILL, HOLLAND & FLINN, INCORPORATED, ET AL.

January 24, 1944

Record No. 2733

Present, CAMPBELL, C. J., and HUDGINS, GREGORY, BROWNING, EGGLESTON, and SPRATLEY, JJ.

45 Appeal from a decree of the Corporation Court of the city of Danville. Hon. Henry C. Leigh, judge presiding.

Affirmed.

46 The opinion states the case.

Opinion.

EGGLESTON, J., delivered the opinion of the court.

On June 19, 1941, Oeland R. Roman, who operated a restaurant in the city of Danville, executed and delivered to Earle Garrett,

as trustee, a deed of assignment for the benefit of the assignor's creditors. The deed conveyed to the trustee all of the personal property and fixtures which had been used by the assignor in the conduct of the business and which were then located on the premises. It authorized the trustee to sell such personal property and out of the proceeds thereof to "pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof."

On July 1, 1941, Waddill, Holland & Flinn, Incorporated, the owner of the premises which had been occupied by the assignor, under a written lease for a five-year term, commencing January 1, 1937, and reserving a rental of $250 per month, levied a distress warrant on the assignor's personal property on the premises for accrued rent of $850 for three and two-fifths months. On the same day it levied an attachment on the same personal property for future instalments of rent for two and three-fifths months in the sum of $650.

On July 2, 1941, the Collector of Taxes for the city of Danville distrained the personal property on the premises for personal property taxes assessed thereon for the years 1939, 1940, and 1941, amounting in all to the sum of $222.31.

No sale was held under the distress warrant, attachment, or distraint for taxes, but pursuant to the terms of the deed
47 of trust, the trustee sold the property of the assignor for the sum of $1,680.80, which is conceded to have been the fair value thereof. He then filed in the court below a bill in chancery asking the guidance of the court in determining the priority of payment of the following claims filed with him:

(1) The city of Danville, for the stated taxes due, in the sum of $222.31;

(2) Waddill, Holland & Flinn, Incorporated, for six months' rent due to and to become due, amounting to $1,500;

(3) The United States, for debts due it by the assignor, amounting to $1,554.63, with interest;

(4) The Virginia Unemployment Compensation Commission, for unemployment compensation taxes due it by the assignor, in the sum of $66.38.

The lower court held that the creditors mentioned were entitled to priority in the order listed, and from a decree distributing the fund in that manner, the United States has appealed. It claims that it is entitled to priority of payment of its claim before those of any of the creditors mentioned.

The Virginia Unemployment Compensation Commission assigns cross-error. While it admits that its claim is subordinate to that of the United States, it contends that it should be paid ahead of the city of Danville and Waddill, Holland & Flinn, Incorporated.

Waddill, Holland & Flinn, Incorporated, has filed no cross-assignment of error to the action in subordinating its claim to that of the city of Danville. Hence, the main question before us is whether the lower court was correct in holding that the rent claim of $1,500 was entitled to priority over that of the United States. If that holding is correct, then, admittedly, after the allowance of reasonable costs of administration, the fund will be exhausted. In that case neither the United States nor the Virginia Unemployment Compensation Commission will be interested in the relative priority of the claims of the city of Danville and those of the landlord.

48 The basis for the contention of the United States is section 3466 of the Revised Statutes (31 U. S. C. A., Sec. 191), which is copied in the margin.[1]

[1] It is settled that this statute creates no lien upon the debtor's property in favor of the United States. It merely confers upon the Government a right of priority of payment out of such property in the hands of the debtor's assignees, or their representatives, under the conditions specified in the statute. United States v. Oklahoma, 261 U. S. 253, 259, 43 S. Ct. 295, 67, L. Ed. 638.

[2, 3] The right of the United States, if any, to priority, became fixed at the date of the delivery of the first deed of assignment. United States v. Oklahoma, supra. Thereafter none of the other creditors could obtain preference over the United States. If not preferred at that time, their claims are subordinate to those of the Government. New York v. Maclay, 288 U. S. 290, 292, 53 S. Ct. 323, 324, 77 L. Ed. 754. Hence, the rights of the landlord and the city of Danville must be determined irrespective of the attachment and distraint levied on the debtor's property after the delivery of the deed of assignment.

The landlord does not dispute this principle, but contends that before the right of priority of the United States accrued under U. S. Rev. Stat., Sec. 3466, by the delivery of the deed of assignment, it (the landlord), by virtue of Virginia Code, Section 5524, had acquired a fixed and specific lien upon the property located on the premises for six months' rent, and that, therefore, its claim is superior to that of the Government.

49 There are expressions in recent opinions of the Supreme Court, the final arbiter in the interpretation of an Act of Congress, which support the view that the rights of a creditor

[1] U. S. Rev. Stat., section 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

who holds a "specified perfected lien" on the property of an insolvent, at the time the rights of the Government attach, under Rev. Stat., Sec. 3466, are superior to those of the Government.

In United States v. Knott, 298 U. S. 544, 549, 550, 56 S. Ct. 902, 905, 80 L. Ed. 1321, 104 A. L. R. 741, speaking through Mr. Justice Brandeis, the court said: "* * * But it is settled that an inchoate lien is not enough to defeat the priority. United States v. Oklahoma, 261 U. S. 253, 43 S. Ct. 295, 67 L. Ed. 638; Spokane County v. United States, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621; New York v. Maclay, 288 U. S. 290, 53 S. Ct. 323, 77 L. Ed. 754. Unless the law of Florida effected, at least as early as the date of insolvency, either a transfer of title from the company, or a *specific perfected lien* in favor of the Florida creditors, the United States is entitled to priority." [Italics supplied.]

In that case it was held (298 U. S., at pages 550, 551, 56 S. Ct., at page 905) that the deposit by a foreign surety company of securities with the State Treasurer, as a condition precedent to its right to do business in the State of Florida, while creating a "trust fund" for the benefit of Florida creditors, constituted "an inchoate general lien" for such purpose, and lacked "the characteristics of a specific perfected lien which alone bars the priority of the United States." See also, United States v. Texas, 314 U. S. 480, 62 S. Ct. 350, 86 L. Ed. 356.

It is true, as argued by the Government, that the Supreme Court has reserved the question as to whether the holder of a specific and perfected lien, without a "change of title or possession," is entitled to priority over the United States Government in the distribution of the estate of an insolvent. See New York v. Maclay, supra (288 U. S., at pages 293, 294, 53 S. Ct., at page 324); United States v. Texas, supra (314 U. S., at page 488, 62 S. Ct., at page 354).

50 [4] However, it seems to us that if before the Government's right of priority attaches, a creditor acquires a specific and perfected lien on the property of the insolvent debtor, the estate of the latter is, for all practical purposes, diminished to the extent of the claim secured by such lien, and the Government's right attaches only to the residue. See Brent v. Bank of Washington, 10 Pet. (35 U. S.) 596, 611, 9 L. Ed. 547.

In Ernst v. Guarantee Millwork, 200 Wash. 195, 93 P. (2d) 404, it was held that where the statute gave the county a "specific lien" on personal property for taxes assessed thereon, such claim was prior to the claim of the United States when the taxpayer thereafter became insolvent.

In Spokane County v. United States, supra (279 U. S., at page 94, 49 S. Ct., at page 325), Mr. Chief Justice Taft said that whether

the lien of State taxes on property of the taxpayer was "specific," is properly "a State question." See also, United States v. Knott, supra (298 U. S., at page 548, 56 S. Ct., at page 904).

The main question for decision, then, is whether, under the law of Virginia, the landlord is given a specific and perfected lien for six months' rent accrued and to accrue, or whether he is given an inchoate lien which becomes specific and perfected only after the levy of a distress warrant or attachment.

[5] At common law the landlord had no lien upon any property of his tenant as security for rent prior to the levy of a distress warrant. 32 Am. Jur., Landlord and Tenant, Sec. 564, p. 461, and authorities there cited. Now the statutes of many States give the landlord a lien for rent upon the property of his tenant and, in case of agricultural lands, upon the crops raised on the demised premises. 32 Am. Jur., Landlord and Tenant, Sec. 575, p. 468.

While there are dicta on the subject, the precise question as to whether such a lien is given by the Virginia statutes,
51 Code, Sections 5519, 5523 and 5524, which are copied in the margin,[2] has not been heretofore presented by this court.

In *Richmond* v. *Duesberry*, 27 Gratt. (68 Va.) 210, 213, 214, this court in speaking of sections 11 and 12 of the Code of 1860, ch. 138 (now Code, Sections 5523 and 5524), said:

"From these sections, it is plain that the intention of the legislature was to secure one year's rent to a landlord against all liens created by the tenant after the lease has commenced.

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[2] SECTION 5519. "Remedy for rent and for use and occupation.—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands. * * *"

SECTION 5523. "On what goods levied.—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress, but for not more than six months' rent if the premises are in a city or town, * * * whether it shall have accrued before or after the creation of the lien. * * *" (As amended by Acts 1922, ch. 495, p. 863; Acts 1932, ch. 357, p. 696.)

SECTION 5524. "When goods not to be removed without paying six months' rent; lien for taxes, levies, and militia fines not affected.—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the sale of goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are in a city or town. * * *. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines. * * *" (As amended by Acts 1922, ch. 495, p. 863; Acts 1932, ch. 357, p. 696.)

52 "The landlord is protected by the statute against all deeds of trust, mortgages, and other liens, where the lien has been created *after* the commencement of the *tenancy*, upon goods on the leased premises which belong to a person *liable for rent*, and where there is an existing liability for rent in arrear, or to become due at the time the lien is created."

In Wades v. Figgatt, 75 Va. 575, 581, 582, it was said that goods of the tenant carried on the leased premises and encumbered after the commencement of the tenancy, "are bound for one year's rent."

In Allen v. Parkey, 154 Va. 739, 748, 149 S. E. 615, 154 S. E. 919, it was held that a trustee in a deed of assignment from the tenant took subject to the provisions of Code, Section 5524, and was bound to pay the landlord six months' rent as a preferred charge, although no distress warrant had issued therefor.

These expressions, and the holding in Allen v. Parkey, supra, would indicate that the landlord has a fixed specific lien on the tenant's goods on the leased premises irrespective of the levy of a distress warrant.

On the other hand, in American Exch. Bank v. Goodlee Realty Corp., 135 Va. 204, 216, 116 S. E. 505, it was said that, "accurately speaking, neither section 5524 nor section 5523 of the present Code * * * gives the landlord any lien for rent," and that until his right has been perfected by the levy of a distress warrant, the landlord's lien is merely "inchoate."

But that statement was not necessary to the decision of the case. There the American Exchange Bank, subsequent to the commencement of the tenancy, acquired a lien on
53 certain goods belonging to the tenant and removed them from the leased premises without paying six months' rent. The court held (135 Va., at page 218) that such removal, in violation of Code, section 5524, was a wrong to the estate of the landlord, for which the latter might maintain an action in tort against the person removing the goods, and recover a personal judgment against him for the value of the goods removed, if not in excess of the amount of one year's rent in arrear, and, if the goods removed were in excess of that amount, then for the amount of the rent in arrear, for one year, and costs. No question as to whether the landlord had a lien on the goods on the leased premises, irrespective of distress, was there involved.

This statement is supported by the cited text in Burks' Pleading and Practice, 1st Ed., section 13, p. 14. The text in the 2d Ed., section 379, pp. 736, 737, and that in the 3d Ed., section 381, pp. 712-714, omits this statement. In a footnote, the 3d Ed., at page 713 says: "It is believed that the ruling in the American Exchange Bank case is correct," but Bradford v. Graham, 287 F. 686, and Thomas Co. v. Lewis, etc., Co., 79 W. Va. 138, 141, 90 S. E. 816, 818, are cited as being to the contrary.

In In re Wynne, 30 Fed. Cas. 752, 762, Case No. 18,117, Mr. Chief Justice Chase, sitting on appeal in the United States Circuit Court, reviewed the Virginia statute fully and held that a lien existed thereunder for not exceeding one year's rent, "independently of any proceeding by distress or attachment", which, he said, are merely remedies for enforcing the lien. He said:

"* * * Liens are [of] various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section of title 41, chapter 138, of the Revised Code of Virginia, adopted in 1860 (now Code, section 5524). * * *

"We can not doubt that this statute creates a lien in favor of the landlord; and a lien of a high and peculiar character. * * *

"* * * Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien
54 under the execution, but the claim which by law is made superior to either as a charge upon the goods is no lien?"

In Bradford v. Graham, 287 F. 686, 689, 690, the Circuit Court of Appeals, speaking through Judge Waddill, adopted the reasoning of In re Wynne, supra, and held that Code, sections 5523 and 5524, give the landlord a lien for rent in arrears and to become due for not exceeding one year (now six months) on the property of the tenant on the leased premises, or that which has been removed therefrom within thirty days, without distraint or attachment being made therefor.

Statutes paralleling Virginia Code, sections 5523 and 5524, are found in Michie's Code of West Virginia (1937), sections 3663 and 3668. The highest court of that State, in construing these statutes, has repeatedly held that the landlord has a fixed and specific lien upon the property of the tenant while upon the leased premises, and not merely an inchoate lien.

In Anderson v. Henry, 45 W. Va. 319, 31 S. E. 998, 999, it is said that the statute "gives the landlord right of payment and preference out of the goods themselves, and this operates as a lien. It gives right to the landlord to detain the goods on his premises against a removal of trust until paid and secured as prescribed, just like an innkeeper or tailor may retain goods until payment. If removed under legal process, it says that the officer, though he may remove them, shall, out of the goods, pay rent in arrear, and sell enough on credit to pay the balance when due. Why all this is not a lien, I fail to see. It makes no difference whether a distress

warrant has been sued out or not or can be used out, for want of maturity of the rent." The court concludes (31 S. E., at page 1000) that section 12, ch. 93, of the Code of 1891 (now Michie's Code of West Virginia (1937), section 3668, which corresponds to Virginia Code, section 5524), "of its own force gives a lien without a distress warrant."

It is significant to note that the West Virginia court supports its reasoning by citing Wades v. Figgatt, supra, and Richmond v. Duesberry, supra, and points out that the Virginia and West Virginia statutes are substantially the same.

The holding that the landlord has a fixed and specific lien, and not merely an inchoate lien, irrespective of the levy of a distress warrant, has been reaffirmed by the West Virginia court in Huffard v. Akers, 52 W. Va. 21, 43 S. E. 124, 127; Thomas Co. v. Lewis, etc., Co., 79 W. Va. 138, 141, 90 S. E. 816, 818.

We may observe in passing that in 18 Am. & Eng. Enc. of Law, Landlord and Tenant, p. 332, note 5, and in 36 Corpus Juris, Landlord and Tenant, section 1447, p. 487, note 53, and in 9 A. L. R. 300, Virginia and West Virginia are classed among those States whose statutes give the landlord a lien on the property of the tenant.

[6] We agree with the reasoning of Mr. Chief Justice Chase in In re Wynne, supra, and that of the West Virginia court, that the Virginia statutes, by clear implication, give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it.

[7] It follows from what we have said that the lower court was right in holding that the claim of the landlord, Waddill, Holland & Flinn, Incorporated, was entitled to priority of payment over that of the United States.

[8, 9] We are further of opinion that the lower court correctly held that Code, section 5524, subordinated the landlord's lien to the lien of the city of Danville for its personal property taxes assessed against the specific chattels on the leased premises. That the city has a lien therefor is settled in this State. Chambers v. Higgins, 169 Va. 345, 351, 193 S. E. 531, 533; Drewry v. Baugh & Sons, 150 Va. 394, 401, 143 S. E. 713.

Whether the city's lien for taxes is such a specific lien as would entitle it to priority of payment over the claim of the United States, if no rent claim were here involved, we need not decide. Cf. Spokane County v. United States, supra; Ernst v. Guarantee Millwork, supra. Since the rent claim takes priority over that of the United States, and completely exhausts the fund, the United States has no concern in the relative priority of the claim of the city and that of the landlord.

The Virginia Unemployment Compensation Commission contends that it is entitled to priority of payment over the claim of the landlord by virtue of section 14 (c) of the Virginia Unemployment Compensation Act (Acts 1936–7, Ex. Sess., ch. 1, p. 3, as amended by Acts 1940, ch. 334, p. 550; Acts 1942, ch. 317, p. 446; Michie's Code of 1942, sec. 1887 (106) (c)), which makes payroll taxes a lien against an employer's assets. However, that section expressly preserves the priority of "any mortgage, deed of trust or other lien duly perfected prior to the date the contributions or any part thereof first accrued."

[10] We are of opinion that the lien of the landlord is a "lien duly perfected" within the meaning of this section. It is settled that the landlord's lien relates back to the beginning of the tenancy. Wades v. Figgatt, supra; Pepsi-Cola Bottling Co. v. Indian Rock Bottling Co., 98 W. Va. 269, 126 S. E. 715; Dingess-Rum Coal Co. v. Draper Eagle Coal Co., 108 W. Va. 37, 150 S. E. 228; 32 Am. Jur., Landlord and Tenant, sec. 579, p. 470. Therefore it was perfected prior to the accrual of the Commission's claim for contributions.

What we have said in disposing of the claim of the United States applies here in consideration of the claim of the Unemployment Compensation Commission. Since the rent claim takes priority over that of the Unemployment Compensation Commission, and completely exhausts the fund, the Unemployment Compensation Commission is not concerned with the relative priority of the claims of the landlord and the city of Danvile.

In our opinion the decree complained of is plainly right, and accordingly it is affirmed.

57 In Supreme Court of Appeals of Virginia

Record No. 2733

UNITED STATES OF AMERICA, APPELLANT

v.

WADDILL, HOLLAND & FLINN, INCORPORATED, TRADING AS HOTEL BURTON, EARLE GARRETT, TRUSTEE UNDER GENERAL DEED OF ASSIGNMENT FROM MRS. OELAND R. ROMAN, TRADING AS ROMAN'S RESTAURANT, VIRGINIA UNEMPLOYMENT COMPENSATION COMMISSION AND CITY OF DANVILLE, APPELLEES

Upon an appeal from and supersedeas to a decree entered by the Corporation Court of the city of Danville on the 5th day of January 1943.

Judgment.

January 24, 1944

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from. It is therefore adjudged, ordered, and decreed that the same be, and is hereby affirmed, and that the appellant pay to the appellees thirty dollars damages and also their costs by them expended about their defense herein.

Which is ordered to be certified to the said corporation court.

58 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE 1944

Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1944

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 925

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, PETITIONER

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	3
Statutes involved	3
Statement	4
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Ernst v. *Guarantee Millwork, Inc.*, 200 Wash. 195	11
Ferris v. *Chic-Mint Gum Co.*, 14 Del., Ch. 232	8
Field v. *United States*, 9 Pet. 182	11
Marshall v. *New York*, 254 U. S. 380	9
Matter of Lincoln Chair & Novelty Co., 274 N. Y. 353	9
New York v. *Maclay*, 59 F. (2d) 979, affirmed 288 U. S. 290	3, 7, 8, 9, 11, 12
New York Terminal Co. v. *Gaus*, 204 N. Y. 512	9
Sola Electric Co. v. *Jefferson Co.*, 317 U. S. 173	12
Spokane County v. *United States*, 279 U. S. 80	8
Spokane Merchants' Ass'n v. *State*, 15 Wash. (2d) 186	11
State v. *Wynne*, 134 Tex. 455	10
Thelusson v. *Smith*, 2 Wheat. 396	10
United States v. *Emory*, 314 U. S. 423	2, 3
United States v. *Knott*, 298 U. S. 544	2, 3
United States v. *Oklahoma*, 261 U. S. 253	11
United States v. *Texas*, 314 U. S. 480	2, 3, 7, 8, 9, 10, 11
Statutes:	
Revised Statutes § 3466	2, 7, 13
Virginia Code of 1936, Secs. 5519, 5522, 5523, 5524	10, 13, 14, 15, 16

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 925

THE UNITED STATES OF AMERICA, PETITIONER

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decision of the Supreme Court of Appeals of Virginia in the above-entitled case, which denied priority to certain claims of the United States over the claim of a landlord for rent.

OPINIONS BELOW

The opinion of the Corporation Court of the City of Danville, Virginia (R. 26–34) is unreported. The opinion of the Supreme Court of Appeals of Virginia (R. 36–44) is not yet officially reported.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered January 24, 1944.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that the decision below denied a title, right, privilege, or immunity claimed by the United States under Section 3466 of the Revised Statutes of the United States. The cases relied upon to sustain the jurisdiction of this Court are *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Emory*, 314 U. S. 423; and *United States* v. *Texas*, 314 U. S. 480.

The court below held that in a state proceeding under an assignment for the benefit of creditors, a debt due the United States was not entitled to priority in payment out of the proceeds of the debtor's property, over a landlord's claim for six months' rent due and to become due, on the ground that a state statute conferred upon the landlord a specific and perfected lien on the debtor's property. The United States contends that under Section 3466 of the Revised Statutes, the debt due the Federal Government is entitled to priority over the landlord's claim.

The United States filed claims with the trustee under the general deed of assignment, asserting its right under R. S. 3466 to priority over the landlord's claim for rent and also over the claim of the City of Danville for taxes (R. 11–12). It raised this federal question in the Corporation Court of the City of Danville by its answer in

this suit brought by the trustee to have the rights of priority of several claimants determined (R. 24–25); in its petition for appeal to the Supreme Court of Appeals of Virginia (R. 1–8); and in its brief and oral argument before that court. Both the Corporation Court of the City of Danville (R. 26–34) and the Supreme Court of Appeals of Virginia (R. 36–44) considered and passed upon this Federal question, specifically denying the United States the asserted priority over the claim of the landlord.

The question presented is one of substance (*New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Emory*, 314 U. S. 423; *United States* v. *Texas*, 314 U. S. 480), as is more fully developed under the reasons for granting the writ, *infra*, pp. 7–12.

QUESTION PRESENTED

Whether, in a state proceeding under an assignment for benefit of creditors, a landlord's lien for six months' rent due and to become due and a lien of a municipality for unpaid taxes, both created by state law, take precedence in payment over a debt due the United States, the prior payment of which is directed by Section 3466 of the Revised Statutes.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

On June 19, 1941, Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, Danville, Virginia, executed a general deed of assignment to a trustee for the benefit of creditors. The property conveyed specifically included all personal property, fixtures, and equipment located on the premises used by the assignor in the conduct of the restaurant business (R. 15–16, 26–27). This personal property was duly sold by the trustee and there remained after the deduction of appropriate administration expenses the sum of $1,407.29 (R. 28).

Aside from debts due to general creditors, the assignor owed the following debts, all of which were asserted to be entitled to priority in payment: (1) The United States, $1,559.63, plus interest;[1] (2) Virginia Unemployment Compensation Commission taxes for 1940 and 1941, $66.38 plus interest; (3) City of Danville personal property taxes for 1939–1941, $300.55; and (4) Waddill, Holland & Flinn, Inc., six months' rent due and to become due, $1,500 (R. 27–28).

Assignor's place of business was leased from Waddill, Holland & Flinn, Inc., for a period of 5

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[1] The debt due the United State comprised the following items: Federal Unemployment Compensation taxes for the year 1940, $209.30; like taxes for the year 1941, $71.70; and a debt arising out of a Federal Housing Administration transaction, $1,278.63 (R. 27). No dispute exists as to the correctness of these amounts or that they were due and owing when the assignment was made.

years beginning January 1, 1937, at a monthly rental of $250 (R. 27). On July 1, 1941, twelve days after the deed of assignment was executed, the landlord issued a distress warrant for 3 and ⅔ months' past-due rent amounting to $850, and levied the same on the property of the assignor located on the leased premises (R. 22, 27). On July 2, 1941, the landlord issued and levied on the same property an attachment for future installments of rent for 2 and ⅔ months in the sum of $650 (R. 22, 28). On July 2, 1941, the City Collector of Danville distrained all of the property on the leased premises for taxes due from the assignor to the City of Danville for the years 1939–41, consisting of taxes totalling $226.81 on the furniture, fixtures, and merchant's capital of the restaurant, and other personal-property taxes totalling $74.64 (R. 28).

On April 20, 1942, the trustee filed a petition in the Corporation Court of Danville, Virginia, reciting that the United States, the State of Virginia, the City of Danville, and the landlord all claimed priority of payment from the proceeds in his hands as trustee, and he requested advice as to the proper distribution to be made of the funds (R. 9–13). The landlord answered, stating that it claimed priority over all other claims against the funds, "by virtue of the levy of said attachment and distress warrant" against the property of the assignor on the leased premises (R. 22).

The Unemployment Compensation Commission of Virginia, an instrumentality of the Commonwealth of Virginia, answered, admitting the priority of the United States but claiming priority over the claim of the landlord (R. 23–24). The United States answered, claiming priority over all other claims (R. 24–25). On January 5, 1943, the Corporation Court of Danville entered judgment, holding that the landlord was entitled to priority over the claims of the United States and of the Unemployment Compensation Commission of Virginia, but that its claim was subordinate to that of the City of Danville for taxes (R. 34–35). On appeal, the Supreme Court of Appeals of Virginia affirmed the landlord's priority over the United States and the State Commission. Since the rent claim completely exhausted the fund, the court did not decide whether the City's tax claim, held to be prior to the rent claim, would be prior to the claim of the United States or the State Commission in the absence of the rent claim. (R. 36–44.)

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Appeals of Virginia erred:

(1) In holding that under R. S. 3466, a debt due the United States is subordinate in payment to a landlord's claim for rent which under Virginia law is secured by a lien upon the debtor's property.

(2) In holding that a landlord's lien for rent under Virginia law upon personal property on the leased premises, even without levy of a distress or attachment, entitles the landlord to priority out of the proceeds of such property, as against a debt due to the United States.

(3) In failing to hold that under R. S. 3466 and this Court's decision thereunder, the debt due the United States is entitled to priority over the claim of the landlord for rent and the claim of the City of Danville for taxes.

REASONS FOR GRANTING THE WRIT

Section 3466 of the Revised Statutes provides that "the debts due to the United States shall be first satisfied" whenever any person indebted to the United States is insolvent or "not having sufficient property to pay all his debts, makes a voluntary assignment thereof" (see Appendix, *infra*, p. 13). It is common ground in the instant case that the debtor, not having sufficient property to pay all her debts, made a voluntary assignment of her property for the benefit of creditors. It is likewise not in question that the claim of the United States is one covered by the preference provided for in R. S. 3466.

While recognizing that the right to priority under R. S. 3466 is to be determined as of the date of the assignment (*United States* v. *Texas*, 314 U. S. 480, 486; *New York* v. *Maclay*, 288 U. S.

290), the court below held that a landlord under Virginia law has a "fixed and specific" lien for six months' rent against all the property of the tenant located on the leased premises, irrespective of attachment or distraint; that the trustee took the property subject to that lien, which continued to attach to the proceeds of the property; and that the landlord was entitled to payment out of such proceeds ahead of the United States. It further held that the claim of the City of Danville for taxes was prior to the landlord's claim as a matter of Virginia law, but found it unnecessary to determine whether the City's claim was superior to that of the United States since the landlord's claim would exhaust all available funds. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 91, with *Ferris* v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232. We submit that the court below has decided an important question of federal law in a manner which conflicts with the decisions of this Court in *New York* v. *Maclay*, 288 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480. Both of these cases rejected liens similar to that of the landlord under Virginia law, as a basis for subordinating the claim of the United States under R. S. 3466.

The *Maclay* case involved a contest for priority between a debt due the United States and the New York corporate franchise tax which by

state statute was made a lien upon all real and personal property of the corporation, superior, as a matter of state law, to existing mortgages. *New York Terminal Co. v. Gaus,* 204 N. Y. 512, 514; cf. *Marshall* v. *New York,* 254 U. S. 380, 383–384. This Court held that even though the lien, as a matter of state law, bound the property in the hands of subsequent purchasers, it was uncertain in amount and "not so perfected or specific as to change the rule of distribution" (288 U. S. at 292). Thereafter, in *Matter of Lincoln Chair & Novelty Co.,* 274 N. Y. 353, the contest was between the United States and a state tax whose amount had been definitely ascertained and liquidated prior to the time when the priority of the United States attached. The New York Court of Appeals held, however, that since no specific property had been seized or appropriated to the satisfaction of the tax or set apart from the general property of the debtor, the state tax lien still remained general and unperfected, and could not defeat the right of the United States to priority under R. S. 3466 (274 N. Y. 358).

In *United States* v. *Texas,* 314 U. S. 480, the contest for priority was between a claim of the United States and that of the State of Texas for gasoline taxes. Under the state statute, which had been drawn specifically to create a paramount

perfected lien for such taxes, the Supreme Court of Texas had held that the lien was superior to all other liens, regardless of their nature (*State* v. *Wynne*, 134 Tex. 455, 469), and was not dependent upon levy or attachment for its existence (at p. 471). This Court nevertheless held that the tax lien so created was inferior to the claim of the United States since the state law "did not of its own force divest the taxpayer of either title or possession" (314 U. S. at 488).[2]

The lien created by Virginia law in the instant case does not purport to divest the debtor of either title or possession. The Virginia statute enables a landlord to levy a distress for six months' rent upon "any goods of the lessee * * * found on the premises" or removed therefrom not more than 30 days prior to the distress; and the goods of the tenant on leased premises may not be removed by any lienor or transferee after commencement of the tenancy, nor taken under legal process, without first paying or securing the landlord for six months' rent in arrears or to become due. Virginia Code, Secs. 5519, 5522, 5523, 5524 (*infra*,

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[2] This criterion of the Government's right to priority may be traced back to *Beluss*on v. *Smith*, 2 Wheat. 396, 425, where this Court said that the right of the United States to be first satisfied out of a debtor's funds applied to all his property except only such as had been transferred to a third person, mortgaged to secure a debt, or secured under a *fi. fa.* and so divested out of the debtor that it would not be subject to the claim of the United States for priority.

pp. 13–16). Here the distraint and attachment were not levied by the landlord until after the deed of assignment had been executed, and while the court below held that the lien existed independent of distress or attachment, it was not considered sufficiently "fixed and specific" to override the general lien of the City of Danville for taxes (R. 38).[3] The landlord's lien conferred by Virginia law does not appear to differ essentially from the statutory lien for corporation license taxes considered by this Court in *New York* v. *Maclay*, 288 U. S. 290, or from the lien for gasoline taxes involved in *United States* v. *Texas*, 314 U. S. 480, neither of which was deemed sufficient to override the priority accorded to the United States by R. S. 3466.

It is of course not sufficient that the court below considered the landlord's lien a "specific and perfected" lien under state law. For the states are without power to establish a priority in conflict with that prescribed by R. S. 3466. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260. The question is

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[3] After the decision of this Court in *United States* v. *Texas*, 314 U. S. 480, the Supreme Court of Washington, in *Spokane Merchants' Ass'n* v. *State*, 15 Wash. (2d) 186, 190, held that actual levy or attachment was necessary to make a state tax superior to the priority conferred upon debts due the United States by R. S. 3466, thereby overruling *sub silentio* its prior decision in *Ernst* v. *Guarantee Millwork, Inc.*, 200 Wash. 195, relied upon by the court below (R. 39).

not whether rent claims "are statutory liens of some sort, but whether they are such liens as the courts of the United States have recognized as entitled to priority over claims due the government." *New York* v. *Maclay*, 58 F. (2d) 979, 981 (C. C. A. 2), affirmed 288 U. S. 290; cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176. Nor is it material that under state law the landlord's lien may relate back to the beginning of the tenancy (R. 44). The "doctrine of relation will not divest the United States of the preference that accrued when" the assignment was made. Cf. *New York* v. *Maclay*, 288 U. S. 290, 293.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 21, 1944.

APPENDIX

Section 3466 of the Revised Statutes of the United States (31 U. S. C. 191) provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Virginia Code of 1936 provides:

> § 5519. REMEDY FOR RENT AND FOR USE AND OCCUPATION.—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefor be non-suited, but may use the same as evidence of the amount of his debt or damages. In any

action for rent, or for such use and occupation, interest shall be allowed as on other contracts. (Code 1887, § 2787.)

* * * * *

§ 5522. WHEN AND BY WHOM DISTRESS MADE.—Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff, or sergeant of the county or city wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed. (Code 1887, § 2790; 1902-3-4, p. 664.)

§ 5523. ON WHAT GOODS LEVIED.—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress, but for not more than six months' rent if

the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming, or agriculture, and for not more than twelve months' rent if the lands or premises are used for farming or agriculture whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section, nor shall the goods of the undertenant be liable to a greater amount than such undertenant owed the tenant at the time the distress was levied. (Code 1887, § 2791; 1922, p. 863; 1932, p. 696.)

§ 5524. WHEN GOODS NOT TO BE REMOVED WITHOUT PAYING SIX MONTHS' RENT; LIEN FOR TAXES, LEVIES, AND MILITIA FINES NOT AFFECTED.—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farm-

ing or agriculture, and not being more altogether than twelve months' rent, if the lands or premises are used for farming or agriculture. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.

For the purpose of this act a monthly or weekly tenancy shall not be construed as a new lease for every month or week of occupation of the premises by the tenant, but his tenancy shall be considered as a continuance of his original lease so long as he shall continue to occupy the property without making any new written lease. (Code 1887, § 2792; 1922, p. 863; 1932, p. 696.)

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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, PETITIONER

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	6
Argument:	
Introductory	7
I. Under the applicable decisions of this Court, the debt due to the United States is entitled to priority in payment over the landlord's lien	9
1. The debt secured is not specific	18
2. The goods subject to the lien are not specific	18
II. The lien of the City of Danville for taxes is not entitled to priority as against the claim of the United States	22
III. Recognizing liens of the character involved in the instant case as superior to the priority conferred on the United States by R. S. 3466 would improperly permit states to substitute their own priority scheme for that directed by Congress	24
Conclusion	28
Appendix	29

CITATIONS

Cases:	
American Exchange Bank v. *Goodlee R. Corp.*, 135 Va. 204	16, 17, 19
Atlantic Ins. Co. v. *Conard*, Fed. Cas. No. 627	11
Beaston v. *Farmers' Bank*, 12 Pet. 102	10, 11
Bradford v. *Graham*, 287 Fed. 686	21
Bramwell v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483	25
Brannon, In re, 62 F. (2d) 959	21
Brent v. *Bank of Washington*, 10 Pet. 596	10, 11, 12
Carey v. *Keith, Inc.*, 250 N. Y. 216	14
Chambers v. *Higgins*, 169 Va. 345	23
Conard v. *Atlantic Insurance Co.*, 1 Pet. 386	10, 11, 12
Conard v. *Nicoll*, 4 Pet. 291	10
Conard v. *Pacific Insurance Co.*, 6 Pet. 262	10
Decker v. *Decker Building Material Co.*, 118 N. J. Eq. 177	24
Dime Deposit Bank v. *Wescott*, 113 Va. 567	19

606949—44——1

Cases—Continued. Page

Dingess-Rum Coal Co. v. *Draper Eagle Coal Co.*, 108 W. Va. 37 ... 19
Drewry v. *Baugh and Sons*, 150 Va. 394 ... 23
Dudley's Case, Fed. Cas. No. 4114 ... 11
Emory v. *St. James Distillery*, 143 S. W. (2d) 318, reversed, *United States* v. *Emory*, 314 U. S. 423 ... 26
Ernst v. *Guarantee Millwork, Inc.*, 200 Wash. 195 ... 26
Ferris v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232 ... 27
Field v. *United States*, 9 Pet. 182 ... 9, 10, 17, 25
Fishburne v. *Engeldove*, 91 Va. 548 ... 20
Geiger's Adm'r v. *Harman's Ex'r*, 44 Va. 130 ... 19
Gerson v. *Shubert Theatre Corp.*, 7 F. Supp. 399 ... 15
Grant Co. v. *Snead*, 37 F. (2d) 705 ... 21
Gurfein v. *Howell*, 142 Va. 197 ... 20
Hancock v. *Whitehall, Etc. Co.*, 100 Va. 443 ... 18, 20
Hogan v. *Callas*, 139 Va. 137 ... 18, 20
Kelly v. *Worsham*, 160 Va. 275 ... 19
Lillie Laurie, The, 50 Fed. 219 ... 12
Lincoln Chair & Novelty Co., Matter of, 274 N. Y. 353 ... 15, 24
Marshall v. *New York*, 254 U. S. 380 ... 14
Michigan v. *United States*, 317 U. S. 338 ... 9, 17, 25
Mosby v. *Leeds*, 3 Call. 439 (7 Va. 380) ... 19
Nathan v. *Giles*, 5 Taunt. 558 ... 12
New Orleans, City of v. *Harrell*, 134 F. (2d) 399 ... 21
New York v. *Maclay*, 288 U. S. 290 ... 6, 8, 9, 11, 12, 13, 14, 21, 22, 24, 25
New York Terminal Co. v. *Gaus*, 204 N. Y. 512 ... 14
North River Coal & Wharf Co. v. *McWilliams Bros., Inc.*, 59 F. (2d) 979 ... 14
People of New York v. *United States*, 106 F. (2d) 210 ... 15
Piedmont Corp. v. *Gainesville & N. W. R. Co.*, 30 F. (2d) 525 ... 26
Postmaster General v. *Robbins*, Fed. Cas. No. 11314 ... 11
Price v. *United States*, 269 U. S. 492 ... 7, 8
Prince v. *Bartlett*, 8 Cranch 431 ... 10
Prudence Corp. v. *Geist*, 316 U. S. 89 ... 26
Reese, Claude D., Inc. v. *United States*, 75 F. (2d) 9 ... 21
Savings Society v. *Multnomah County*, 169 U. S. 421 ... 10, 11
Sola Electric Co. v. *Jefferson Co.*, 317 U. S. 173 ... 26
Spokane County v. *United States*, 279 U. S. 80 ... 9, 12, 13, 17, 21, 25
Spokane Merchants' Ass'n v. *State*, 15 Wash. (2d) 186 ... 24, 26
State v. *Wynne*, 134 Tex. 455 ... 27
Thelusson v. *Smith*, 2 Wheat. 396 ... 6, 9, 10, 11, 12
Tropical Printing Co. v. *Union Title Guarantee Co.*, 180 La. 702 ... 24
U. S. F. & G. Co. v. *Sweeney*, 80 F. (2d) 235 ... 21
United States v. *Canal Bank*, Fed. Cas. No. 14715 ... 10

Cases—continued. Page

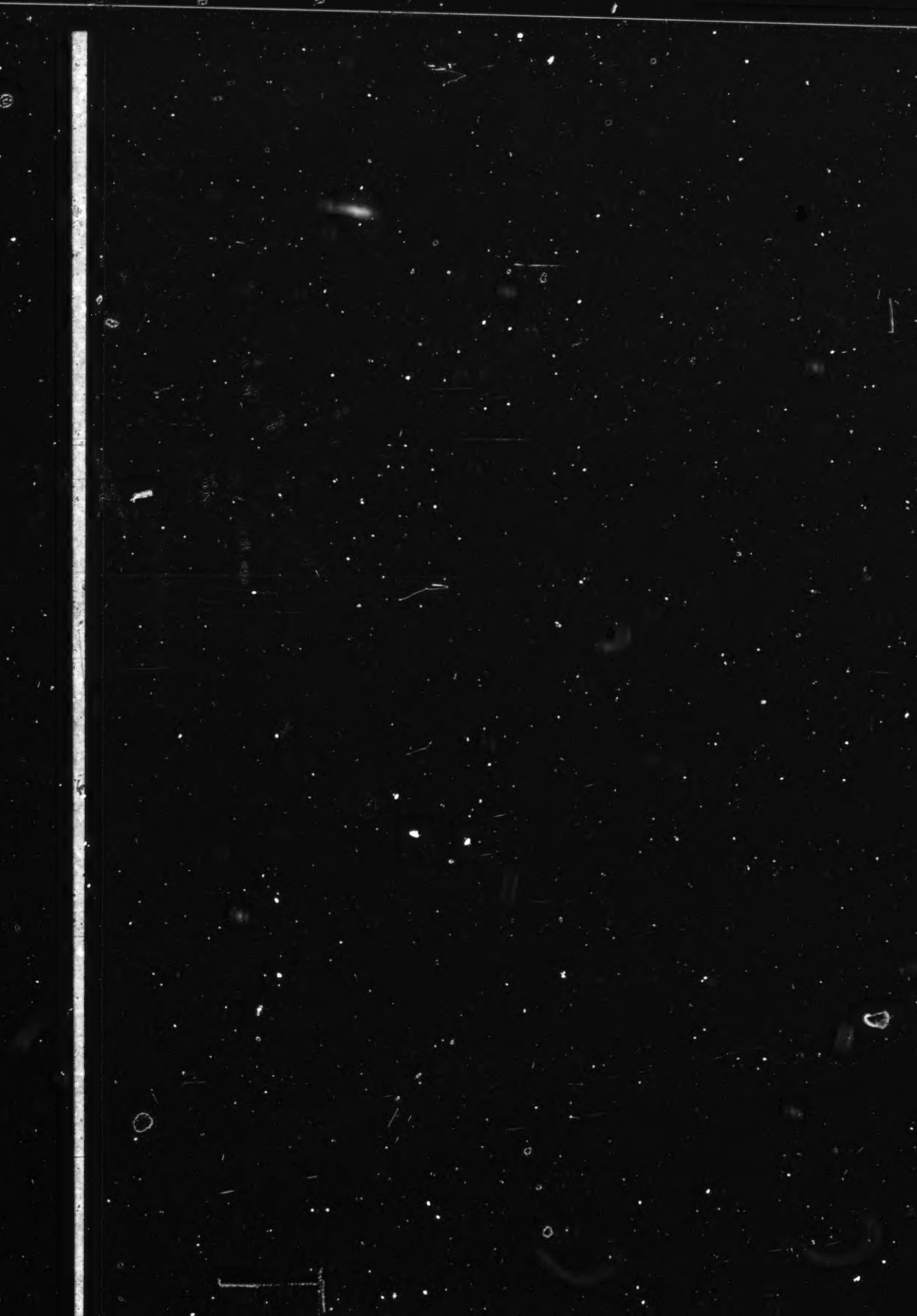
United States v. *Duncan*, Fed. Cas. No. 15003 ... 11
United States v. *Emory*, 314 U. S. 423 ... 8, 17, 21, 24
United States v. *Hooe*, 3 Cranch 73 ... 10
United States v. *Knott*, 298 U. S. 544 ... 13, 15
United States v. *Oklahoma*, 261 U. S. 253 ... 8, 9, 17, 25
United States v. *Reese*, 131 F. (2d) 466 ... 21
United States v. *State Bank of North Carolina*, 6 Pet. 29 ... 25
United States v. *Summerlin*, 310 U. S. 414 ... 8
United States v. *Texas*, 314 U. S. 480 ... 6, 8, 9, 10, 11, 12, 13, 15, 18, 20, 21, 22, 24, 25
Vandewater v. *Mills*, 19 How. 82 ... 12
Wades v. *Figgatt*, 75 Va. 575 ... 18
West Coast Power Co. v. *So. Kansas Gas Co.*, 20 Del. Ch. 130 ... 24
West Side Paper Co., In re, 162 Fed. 110 ... 27
Wickham v. *Richmond Spike Co.*, 107 Va. 44 ... 20
Williamson v. *Payne*, 103 Va. 551 ... 23

Statutes:

Act of 1748, c. 15, secs. 5, 6 (Va. Laws 1752) ... 16
Act of March 3, 1797, sec. 5 (1 Stat. 515) ... 7
Act of March 2, 1799, sec. 65 (1 Stat. 676) ... 7, 6
Act of 8 Anne, c. 14, sec. 1 ... 16
Revised Statutes, sec. 3466 (31 U. S. C. sec. 191) ... 7, 29
1 Virginia Revised Code (1819) p. 448 ... 16
Virginia Code (1887), sec. 2792 ... 16, 17
Virginia Code (1919), sec. 5524 ... 16
Virginia Code of 1936:
  Sec. 5519 ... 16, 29
  Sec. 5519–5523 ... 20
  Sec. 5522 ... 30
  Sec. 5523 ... 16, 19, 30
  Sec. 5524 ... 16, 19, 31
  Sec. 5527 ... 20, 32
  Sec. 5528 ... 20, 33
  Sec. 5783 ... 20, 33
  Sec. 6518 ... 34
  Sec. 6519 ... 20, 34
Virginia Code (1942) sec. 5524 ... 16

Miscellaneous:

II Jones, Liens, secs. 1676 *et seq.* ... 12



In the Supreme Court of the United States

OCTOBER TERM, 1944

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THE UNITED STATES OF AMERICA, PETITIONER

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Corporation Court of the City of Danville, Virginia (R. 26–34) is unreported. The opinion of the Supreme Court of Appeals of Virginia (R. 36–44) is reported in 182 Va. 351.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on January 24, 1944 (R. 45). The petition for a writ of certiorari was filed on April 24, 1944, and was granted on May 29, 1944 (R. 46). The jurisdiction of this Court

rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a state proceeding under a general assignment for benefit of creditors, a landlord's lien for six months' rent due and to become due, and the lien of a municipality for unpaid taxes, both created by state law, take precedence in payment over a debt due the United States, the prior payment of which is directed by Section 3466 of the Revised Statutes.

STATUTES INVOLVED

Section 3466 of the Revised Statutes, and the applicable portions of the Virginia statutes involved, are set forth in the Appendix, *infra*, pp. 29–35.

STATEMENT

Mrs. Oeland Roman was doing business under the trade name of Roman's Restaurant, Danville, Virginia, on premises leased from respondent Waddill, Holland & Flinn, Inc. (R. 15). On June 19, 1941, Mrs. Roman executed a general deed of assignment to a trustee for the benefit of creditors (R. 15–17), specifically conveying all personal property, fixtures, and equipment used by the assignor in the conduct of the restaurant and located on its premises (R. 15, 26–27). The property assigned was duly sold by the trustee, and after the deduction of appropriate administrative

expenses, there remained the sum of $1,407.29 (R. 28). Aside from debts due to general creditors, the assignor was indebted to the following, each of whom claimed priority of payment in the amounts respectively set forth:

(1) The United States, $1,559.63, plus interest;[1]

(2) Virginia Unemployment Compensation Commission, for taxes for 1940 and 1941, $66.38, plus interest;

(3) City of Danville, for personal property taxes for 1939–1941, $300.55; and

(4) Waddill, Holland & Flinn, Inc., six months' rent due and to become due, $1,500.00. (R. 27–28.)

The assignor's lease from Waddill, Holland & Flinn ran for a period of five years beginning January 1, 1937, at a monthly rental of $250.00 (R. 27). On July 1, 1941, 12 days after the deed of assignment was executed, the landlord obtained the issuance of a distress warrant for 3⅗ months' past due rent amounting to $850, and an attachment for 2⅗ months' future installments of rent amounting to $650 (R. 25, 28); on the same day

[1] The sum of $1,559.63 was comprised of the following items: Federal Unemployment Compensation taxes for the year 1940, $209.30; like taxes for the year 1941, $71.70; and a debt arising out of a Federal Housing Administration transaction, $1,278.63 (R. 27). No controversy exists as to the correctness of these amounts or that they were due and owing to the United States prior to the date when the assignment was made.

the landlord levied the warrant and attachment on the assignor's property located on the leased premises (R. 22, 27). On July 2, 1941, the City Collector of Danville distrained all of the property on the leased premises for personal property taxes amounting to $301.45 due from the assignor to the City of Danville for the years 1939–1941, comprising $226.81 due on the furniture, fixtures, and merchants' capital of the restaurant, and $74.64 due on other personal property (R. 23).

On April 20, 1942, the trustee under the general assignment filed a petition in the Corporation Court of Danville, Virginia, in which he recited the various claims for priority and requested advice as to the proper distribution to be made of the funds in his hands (R. 9–13). The landlord answered, claiming priority in payment over all other claims against the fund "by virtue of the levy of said attachment and distress warrant" against the property of the assignor on the leased premises (R. 22). The Unemployment Compensation Commission of Virginia, an instrumentality of the Commonwealth of Virginia, answered, admitting the priority of the United States but claiming priority over both the City of Danville and the landlord (R. 23–24). The United States answered, claiming priority over all other claimants (R. 24–25). On January 5, 1943, the Corporation Court of Danville entered judgment, holding that the landlord was entitled to priority in pay-

ment over the debts due the United States and the Unemployment Compensation Commission of Virginia but that its claim was subordinate to that of the City of Danville for taxes in the sum of $222.31 (R. 34–35). The Corporation Court concluded that a municipal tax assessed against specific chattels, such as furniture and equipment, was a paramount and specific lien as a matter of state law (R. 33). In computing the amount of the city's taxes entitled to priority, it deducted from the total taxes of $301.45 the tax of $4.50 assessed on merchants' capital ($1.50 for each of the three years in question) and the tax of $74.64 assessed on other personal property of the assignor, apparently on the ground that they were not specific liens (R. 28, 33). The United States appealed to the Supreme Court of Appeals of Virginia (R. 1–9), which affirmed the distribution ordered by the Corporation Court (R. 36–44).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Appeals of Virginia erred:

(1) In holding that under R. S. 3466, a debt due the United States is subordinate in payment to a landlord's claim for rent which under Virginia law is secured by a lien upon the debtor's property.

(2) In holding that a landlord's lien for rent under Virginia law upon personal property on the leased premises, even without levy of distress or

attachment, entitles the landlord to priority out of the proceeds of such property, as against a debt due to the United States.

(3) In failing to hold that under R. S. 3466 and this Court's decisions thereunder, the debt due the United States is entitled to priority over the claim of the landlord for rent and the claim of the City of Danville for taxes.

SUMMARY OF ARGUMENT

I

This Court has never sustained, over the priority conferred upon the United States by R. S. 3466, the claim of any creditor not having title to or possession of the property as to which he asserts priority. Cf. *Thelusson* v. *Smith*, 2 Wheat. 396. It has consistently declared that to prevail the lien must at least be "specific and perfected." Upon analysis of the attributes given by Virginia law to the statutory lien here asserted, it is apparent that the lien is no more "specific and perfected" than those in *New York* v. *Maclay*, 288 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480, which were held inferior to the claim of the United States. Thus neither the amount secured by the landlord's lien nor the property to which it attaches is specific, and the lien is enforceable by proceedings judicial in character.

II

The same considerations attach to the city's tax lien. That lien likewise fails to attach to specific

property and cannot take precedence over the priority of the United States.

III

A state statute declaring the order of priority of payment of various classes of creditors cannot disregard the command of R. S. 3466. We submit that a state cannot achieve the same results by indirection merely by using the terminology of lien. The declaration of a statutory lien, such as those here asserted, which is neither specific nor perfected and involves no transfer of title or possession, amounts in effect to no more than a declaration by the state of the order of priority, which cannot override the contrary priority prescribed by R. S. 3466.

ARGUMENT

Introductory.—Section 3466 of the Revised Statutes (31 U. S. C. 191), *infra*, p. 29, provides that "the debts due to the United States shall be first satisfied" whenever any person indebted to the United States, "not having sufficient property to pay all his debts, makes a voluntary assignment thereof."[2] Here, Mrs. Ronan, being a debtor to the United States and not having sufficient property to pay all her

[2] This provision was derived from Section 5 of the Act of March 3, 1797 (1 Stat. 515) and Section 65 of the Act of March 2, 1799 (1 Stat. 676). For earlier legislation on the subject, see *Price* v. *United States*, 269 U. S. 492, 500–501.

debts, made a voluntary assignment of her property for the benefit of creditors.

While recognizing that the right of the United States to priority under R. S. 3466 became fixed at the date of the assignment (*United States* v. *Oklahoma*, 261 U. S. 253, 260), and that other claimants, if not preferred at that time, could not thereafter obtain a preference (*New York* v. *Maclay*, 288 U. S. 290, 293; *United States* v. *Texas*, 314 U. S. 480, 486), the court below held that under Virginia law a landlord has a "fixed and specific" lien for six months' rent against all property of the tenant located on the leased premises, irrespective of attachment or distraint;[4] that the trustees took the assignor's property subject to that lien, which continued to attach to the proceeds of the property; and that the landlord was entitled to payment out of such proceeds ahead of the United States. The court further held that the claim of the City of Danville for taxes

[3] It was not questioned at any stage of the proceedings below that the claims of the United States here involved (see fn. 1, *supra*, p. 3) are "debts due to the United States" within the meaning of R. S. 3466, both in respect of the taxes (*Price* v. *United States*, 269 U. S. 492) and the Federal Housing Administration claims (*United States* v. *Summerlin*, 310 U. S. 414; *United States* v. *Emory*, 314 U. S. 423). Nor was it questioned that the nature of the assignment was such as to render R. S. 3466 applicable.

[4] Since the doctrine of relation back may not be applied in derogation of R. S. 3466 (*New York* v. *Maclay*, 288 U. S. 290, 293), the court below correctly held that the landlord's subsequent distraint and attachment added nothing to the claims of the landlord and the city *vis-à-vis* the United States (R. 38).

was, as a matter of Virginia law, superior to the landlord's claim, but it found it unnecessary to determine whether the city's claim was superior to that of the United States, since the landlord's claim would exhaust all available funds. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 91.

We submit that the decision of the court below, subordinating the claim of the United States to those of the landlord and municipality, is contrary to the decisions of this Court in *Thelusson* v. *Smith*, 2 Wheat. 396; *New York* v. *Maclay*, 288 U. S. 290; and *United States* v. *Texas*, 314 U. S. 480. We further submit that the decision of a state court as to the type of lien which a landlord possesses under state law and the rights which he acquires thereby, is not controlling in determining whether the lien is superior to the priority conferred on the United States by R. S. 3466. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 90; cf. *Michigan* v. *United States*, 317 U. S. 338, 340.

I

UNDER THE APPLICABLE DECISIONS OF THIS COURT, THE DEBT DUE TO THE UNITED STATES IS ENTITLED TO PRIORITY IN PAYMENT OVER THE LANDLORD'S LIEN

In considering the scope of the priority conferred upon the United States by Section 65 of the Act of March 2, 1799 (which thereafter became

R. S. 3466), this Court early held the United States entitled to priority over a creditor having an earlier judgment lien, and declared that the words of the statute "are as general as any which could have been used" and give the Government's claim preference over "all debts due [from a debtor of the United States] to individuals, whatever may be their dignity." *Thelusson* v. *Smith*, 2 Wheat. 396, 425; see also *United States* v. *Texas*, 314 U. S. 480, 484. The only exception which the *Thelusson* case recognized to the absolute priority of the United States was as to property which, because it had in good faith been conveyed, mortgaged, or seized under a *fieri facias* before the preference of the United States accrued, could be said to be no longer part of "the debtor's estate" (*ibid.*).

Other cases have accordingly held that a mortgagee[5] and a prior attaching creditor[6] are entitled to prior satisfaction out of the mortgaged or attached property. These exceptions are based upon the theory that there has been an actual conveyance or divestment of the mortgaged or attached property of the debtor prior to the accrual of the Government's preference. See *Conard* v.

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[5] *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386; *Conard* v. *Nicoll*, 4 Pet. 291; *Conard* v. *Pacific Insurance Co.*, 6 Pet. 262; see *United States* v. *Hooe*, 3 Cranch 73, 90; *Field* v. *United States*, 9 Pet. 182, 201; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611–612; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428.

[6] *Prince* v. *Bartlett*, 8 Cranch 431; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 135–136; *United States* v. *Canal-Bank*, Fed. Cas. No. 14715 (D. Me. 1844).

Atlantic Insurance Co., 1 Pet. 386, 441; *Brent* v. *Bank of Washington*, 10 Pet. 596, 612; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 136; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428. In *New York* v. *Maclay*, 288 U. S. 290, 293–294, the mortgage cases were so explained, and doubt was expressed whether the result would be the same in jurisdictions where a mortgage is regarded as creating a lien only. And in *United States* v. *Texas*, 314 U. S. 480, 484, 485, 486, the mortgage cases were described as "an exception" to the command of R. S. 3466 whose "current vitality" was considered open to question.[7]

[7] Some early circuit court decisions have suggested that *Thelusson* v. *Smith* may have been overruled or disapproved by *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, and *Brent* v. *Bank of Washington*, 10 Pet. 596. See *Dudley's Case*, Fed. Cas. No. 4114 at pp. 1154–1155 (E. D. Pa. 1842); *United States* v. *Duncan*, Fed. Cas. No. 15003 at pp. 935–936 (D. Ill. 1850); cf. *Postmaster General* v. *Robbins*, Fed. Cas. No. 11314 at p. 1127 (D. Me. 1829). Neither case is inconsistent with the *Thelusson* case. The *Conard* case, which affirmed a decision at circuit (*Atlantic Ins. Co.* v. *Conard*, Fed. Cas. No. 627 (D. Pa. 1827)) by Mr. Justice Washington, the author of the opinion in *Thelusson* v. *Smith*, involved an assignment of bills of lading which was held operative to pass equitable title to the goods and thus to place the creditor in the position of a mortgagee. The *Brent* case was a suit by executors of the debtor to compel a creditor bank to transfer to them on its books shares of its stock owned by the debtor. The decision was rested on the power of the bank under its charter to refuse to transfer the stock until the debts due it were paid; the bank was accordingly in a position analogous to that of a lienor in possession, and the priority of the United States was held not to attach because the stock never came into the hands of the debtor's executors.

Whatever may be the rule as to mortgages, if regarded as conveyances, this Court has consistently reserved the question whether a specific, perfected lien, accompanied by possession, can prevail over the Government's statutory priority. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Spokane County* v. *United States*, 279 U. S. 80, 91; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480. It has never sustained, against the priority of the United

Nothing said in either case casts doubt upon the decision in *Thelusson* v. *Smith*. The *Brent* case merely reserves the question whether the Government's priority will defeat a general or specific lien. And the discussion in the *Conard* case is addressed primarily to the contention, there advanced, that the statutory priority of the United States is "superior to any lien; and even to an actual mortgage" (1 Pet. at p. 441). *Thelusson* v. *Smith* was held not to support that broad contention, the Court pointing out that the *Thelusson* case itself reserved the case of a mortgage, and adding that "it has never yet been decided by this court, that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possesion or not" (1 Pet. at p. 441). In support of its further statement (p. 442) that "before such decision is made, it will deserve very grave deliberation," the Court cited *Nathan* v. *Giles*, 5 Taunt. 558, 574, a case of a lienor in possession, and the only illustrations which it gave of nonpossessory liens which might possibly override the priority of the United States were certain maritime liens not governed by common-law rules (see *Vandewater* v. *Mills*, 19 How. 82, 89; II Jones, Liens, secs. 1676 *et seq.*) and entitled in admiralty to priority even over an earlier mortgage (*The Lillie Laurie*, 50 Fed. 219, 221 (C. C. E. D. Tex.)). In short, the proposition whose decision would "deserve very grave deliberation" was that no lien short of a conveyance would withstand the priority of the United States.

States, an asserted lien created by state statute and supported by neither title nor possession. In recent years, the Court has consistently upheld the priority of the United States over such statutory liens. *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Texas*, 314 U. S. 480. While it has done so on the ground that the liens there in question were not "specific and perfected," one consideration which has been given great weight in reaching that conclusion has been the want of title or possession in the creditor. Thus, in *New York* v. *Maclay*, 288 U. S. 290, 293–294, the lien for New York state franchise taxes was held subordinate "unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession." And in *United States* v. *Texas*, 314 U. S. 480, 488, the Court ruled that Texas' lien for taxes could not prevail over the federal claim since the state law "did not of its own force divest the taxpayer of either title or possession." (See fn. 14, *infra*, p. 24.)

We submit that the landlord's lien here asserted fails to satisfy the requirement of these cases. It does not purport to divest the debtor of title or possession. And it does not even meet the criteria of a "specific and perfected lien" which this Court has announced as a *sine qua non* to the lienor's right to prevail.

In *New York* v. *Maclay*, 288 U. S. 290, the New York corporate franchise tax, which under state law was a lien upon all real and personal property of the corporation, superior to existing mortgages (*New York Terminal Co.* v. *Gaus*, 204 N. Y. 512, 514 (1912); *Carey* v. *Keith, Inc.*, 250 N. Y. 216 (1929); cf. *Marshall* v. *New York*, 254 U. S. 380, 383–384), and binding upon the property in the hands of subsequent purchasers, was nevertheless held "not so perfected or specific as to change the rule of distribution" under R. S. 3466, on the ground, among others, that the exact amount of the tax had not been ascertained so that the lien was inchoate (288 U. S. at 292–293). The Court expressly reserved the question whether the United States would be entitled to priority if the lien were specific and perfected.* Likewise, in

* The Circuit Court of Appeals for the Second Circuit had also upheld the priority of the United States (*sub nom. North River Coal & Wharf Co.* v. *McWilliams Bros., Inc.*, 59 F. (2d) 979, 981), saying:

> While it is clear that in the present case the taxes due the state of New York prior to the receivership were a general lien upon the real and personal property of the defendant at the time when the receivers were appointed, the question is not whether these taxes are statutory liens of some sort, but whether they are such liens as the courts of the United States have recognized as entitled to priority over claims due the government.
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> * * * * * *
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> In view of the sweeping provisions of Rev. St. § 3466, (31 U. S. C. A. § 191), it seems unlikely that it was intended to allow the mere statutory declaration by a state of a general lien to give the latter a preference over debts and taxes due the government. Neither the decisions

United States v. *Knott*, 298 U. S. 544, the claim of the United States was held superior as to securities deposited with the State Treasurer of Florida to secure claims of creditors there. Although specific property was thus outside the debtor's possession and pledged to secure a particular class of claims, the lien was held not to be "specific and perfected" because the identity of the creditors entitled to resort to the securities was not established at the time when the priority of the United States attached.

Certainty as to the amount due, however, is not enough. Even where the amount of the tax had been definitely ascertained and liquidated prior to the accrual of the priority of the United States, the Court of Appeals of New York, in *Matter of Lincoln Chair & Novelty Co.*, 274 N. Y. 353, 358 (1937), held that the tax lien remained general and unperfected insofar as R. S. 3466 was concerned, because no specific property had been seized or appropriated and set apart from the general property of the debtor for the satisfaction of the tax. (See also *People of New York* v. *United States*, 106 F. (2d) 210, 212 (C. C. A. 3); *Gerson* v. *Shubert Theatre Corp.*, 7 F. Supp. 359 (S. D. N. Y.).) And in *United States* v. *Texas*, 314 U. S. 480, while the Court emphasized

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of the Supreme Court nor the specified priorities allowed third parties under Rev. St. § 3186 as amended (26 U. S. C. A. § 115) indicate that section 3466 is subject to any such limitation. * * *

the fact that the amount of the gasoline tax liability secured by the lien was "unliquidated and uncertain," it also pointed out (314 U. S. 480, 487, 488) that the property subject to the lien was "neither specific nor constant" and that the lien was not self-executing and "could not be enforced without the assistance of the [state] courts."

We submit that the landlord's lien here asserted is insufficiently specific to prevail under the rule of these cases. The Virginia Code authorizes a landlord to levy distress for six months' rent upon "any goods of the lessee * * * found on the premises" or removed from them not more than 30 days prior to the levy (Va. Code of 1936, Sections 5519, 5523; see Appendix, *infra*, pp. 29–31). In addition, it provides that the goods of the tenant on leased premises in a city or town (as was the case here) may not be removed by a lienor or purchaser, nor taken under legal process, save "on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due," not to exceed six months' rent. (Va. Code, Section 5524; Appendix *infra*, p. 31).[9]

[9] Section 5524 appears as Sections 5 and 6 of Chapter 15 of the Act of 1748 (Virginia Laws 1752, p. 292), and has been continued in the successive revisions of the Virginia Code. 1 Va. Rev. Code (1819), p. 448; Va. Code (1887) sec. 2792; Va. Code (1919) sec. 5524; Va. Code (1942) sec. 5524. It was derived from the Act of 8 Anne c. 14, sec. 1. See 1 Va. Rev. Code (1819) p. 448; *American Exchange Bank* v. *Goodlee R. Corp.*, 135 Va. 204, 212–215 (1923). In its original form, it

The Supreme Court of Appeals of Virginia held that Section 3524 creates a lien, effective as of the date the tenancy commenced, without the necessity for any further proceeding by distress, attachment, or otherwise. That holding on a proposition of state law is, of course, controlling here. But the question whether the lien is sufficiently "specific and perfected" to override the statutory priority of the United States is a question of federal law as to which the characterization given by the state court cannot control. The states may not establish a priority in conflict with that prescribed by Section 3466. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 90; *United States* v. *Emory*, 314 U. S. 423, 426–427; cf. *Michigan* v. *United States*, 317 U. S. 338, 340. Accordingly, we look not to the characterization given the lien by the Virginia court in the present case, but to the actual rights and powers conferred by the lien upon the parties as declared by the state courts.

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applied only where the goods were taken on "execution or on any pretence whatsoever" (the word "or," which does not appear in the English statute, has been said to be a typographical error, *American Exchange Bank* v. *Goodlett R. Corp.*, *supra*, 214). The Code of 1887 extends the landlord's right to cases where a lien is asserted on a tenant's property, and in the revision of 1919 a prohibition against removal of the goods by "purchasers" was expressly included, the revisers' note stating that this was thought merely to express more clearly the effect of the Section as it stood.

When so measured, the lien lacks specificity in several respects:

1. *The debt secured is not specific.*—The lien attaches not for the rent due during a particular six months' period, but for rent which may happen to be due at or after the time when the lien is asserted (see *Wades* v. *Figgatt*, 75 Va. 575, 582 (1881)), and where the assertion of the lien is not based upon the levy of a distress, that time is selected by someone other than the landlord. The amount of the debt secured is not specific either; there may be dispute as to the rate of rental prescribed (*e. g.*, *Hagan* v. *Callas*, 139 Va. 137 (1924)), and in any event the amount secured will depend upon whether at the time the lien is asserted the tenancy has terminated or will terminate within six months of the date to which the rent has been fully paid. Moreover, the amount of the debt secured by the lien or for which distraint may be made may be subject, prior to distraint, to the right of the tenant to a set-off. Cf. *Hancock* v. *Whitehall, Etc. Co.*, 100 Va. 443, 447 (1902). Thus, as in *United States* v. *Texas*, 314 U. S. 480, 487, 488, the amount of the debt for which the lien is a security "is left to determination by the courts"; the lien "could not become specific until the exact amount of the [debt] due had been determined."

2. *The goods subject to the lien are not specific.*—The lien extends to the tenant's interest in whatever goods he may bring onto the premises, including goods brought there after the beginning of

the tenancy (cf. *Dingess-Rum Coal Co.* v. *Draper Eagle Coal Co.*, 108 W. Va. 37 (1929))—a matter as to which the landlord usually has neither knowledge nor control. It does not prevail over a purchase-money mortgage or any other lien which attached before the goods were brought on the premises. Va. Code, Secs. 5523–5524, Appendix, *infra*, pp. 30–32. The Virginia statute prohibits removal only by a lienor or purchaser;[10] nothing in it would appear to prevent the tenant, or any other person, from removing whatever goods he may choose. When goods are removed from the premises, whether in violation of the statute or not, it does not appear that the landlord can follow the goods.[11] In any event, the landlord can neither seize nor sell the tenant's goods save by the process of distraint provided by the statute.

[10] It has been indicated that property sold by a merchant in the ordinary course of business is not subject to this provision. *American Exchange Bank* v. *Goodlet R. Corp.*, 135 Va. 204, 222 (1923).

[11] The landlord may, under other provisions of the statute, distrain within 30 days as if the goods had not been removed (Va. Code, Sec. 5523)—a right which exists regardless of whether the removal of the goods was in violation of Section 5524. But once the goods have been removed from the premises, whether or not the right of distraint remains, the landlord cannot prevail over an attaching creditor. *Geiger's Adm'r* v. *Harman's Ex'r*, 44 Va. 130 (1846); *Mosby* v. *Leeds*, 3 Call. 439 (7 Va. 380) (1803); *Dime Deposit Bank* v. *Wescott*, 113 Va. 567 (1912). Aside from the right of distraint, his only remedy would appear to be a personal action for damages against a purchaser or lienor who removed goods in violation of Sec. 5524 *American Exchange Bank* v. *Goodlet R. Corp.*, 135 Va. 204 (1923); *Kelly* v. *Worsham*, 160 Va. 275 (1933).

(Va. Code, Secs. 5519–5523), which is a "proceeding * * * judicial in * * * character." *Wickham* v. *Richmond Spike Co.*, 107 Va. 44, 49 (1907). The distress warrant is returnable in court (Va. Code, Sec. 5528), and the tenant has the opportunity to make any defense to the distraint (Sec. 6519) and thus to secure judicial trial of the amount of rental due (*Hogan* v. *Callas*, 139 Va. 137 (1924); cf. *Garfein* v. *Howell*, 142 Va. 197, 201 (1925)) and to claim any right of set-off (*Hancock* v. *Whitehall, Etc. Co.*, 100 Va. 443, 447 (1902)). Only sufficient goods may be distrained to satisfy the rent justly believed due, and the tenant has an action for damages, comparable to an action for trespass, for excessive distraint (Va. Code, Sec. 5783; *Fishburne* v. *Engeldove*, 91 Va. 548 (1895); cf. Va. Code, Sec. 5527), thus indicating that the lien is inchoate and not specific and perfected.

It is apparent that the property subject to the lien here involved is no more "specific and constant" that was the state lien on the "property devoted to or used in [the debtor's] business as a distributor," which was involved in *United States* v. *Texas*, 314 U. S. 480, 487. The amount of the debt secured is not fixed. And not until distraint by the landlord does the lien attach to specific goods in a specific amount so as to enable the landlord to satisfy his claim out of them. Prior to distraint, the "lien" is merely a right to pre-

vent removal of the goods from the premises by certain classes of persons, and a right under state law to priority in distribution so long as the goods remain on the premises. In short, as in *United States* v. *Texas*, 314 U. S. 480, 488, the lien in question "did not of its own force divest the [debtor] of either title or possession * * * and it could not be enforced without the assistance of the courts." Until such enforcement, it amounts to no more than a state statutory declaration as to the order of payment of creditors, which cannot override the inconsistent declaration of R. S. 3466.[12]

Thus, the landlord's lien conferred by Virginia law does not appear to differ essentially from the

[12] The fact that a landlord's lien, where created by state law, is considered to come within section 67f of the Bankruptcy Act, thereby taking ahead of any of the priorities given by section 64a thereof (*e. g.*, *In re Brannon*, 62 F. (2d) 959 (C. C. A. 5); *Bradford* v. *Graham*, 287 Fed. 686 (C. C. A. 4); *Grant Co.* v. *Snead*, 37 F. (2d) 705 (C. C. A. 4)), has no significance in a proceeding under R. S. 3466. Under the bankruptcy statute, the claims of the United States for taxes and other debts are subordinate under section 67f of that statute to those of the states or individuals secured by general liens. *U. S. F. & G. Co.* v. *Sweeney*, 80 F. (2d) 235 (C. C. A. 8); *Claude D. Reese, Inc., v. United States*, 75 F. (2d) 9 (C. C. A. 5); cf. *City of New Orleans* v. *Harrell*, 134 F. (2d) 399, 402 (C. C. A. 5). General liens, of course, are subordinate to the priority of the United States under R. S. 3466. *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maday*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480; *United States* v. *Reese*, 131 F. (2d) 466, 469–470 (C. C. A. 7). The two Acts are not *in pari materia*. *United States* v. *Emory*, 314 U. S. 423, 428–429.

statutory lien for corporation license taxes considered by this Court in *New York* v. *Maclay*, 288 U. S. 290, or from the lien for gasoline taxes involved in *United States* v. *Texas*, 314 U. S. 480. In both those cases, the state taxes, as a matter of state law, were paramount and superior to all other liens, including the lien created by pre-existing mortgages. They failed in the contest of priority with the United States because, as was pointed out in the latter case, they did not of their own force divest the taxpayer of either title or possession, or because they were not so "specific and perfected" against an identifiable chattel as in effect to divest the property from the debtor's estate. We believe that similar considerations here obtain to subordinate the Virginia statutory lien.

II

THE LIEN OF THE CITY OF DANVILLE FOR TAXES IS NOT ENTITLED TO PRIORITY AS AGAINST THE CLAIM OF THE UNITED STATES

The Corporation Court of the City of Danville held that the taxes due the City of Danville were a specific lien on the furniture and equipment superior to the claim of the United States (R. 33–34). The Supreme Court of Virginia did not decide whether this tax lien was sufficiently "specific and perfected" to override the claim of the United States, since it found that the landlord's claim would exhaust the available fund (R. 43).

If, as we contend, this ruling as to the landlord's priority was error, the relative priorities of the United States and the city become pertinent.

In awarding priority to the city, the Corporation Court apparently recognized that the municipal tax confers a lien on a specific chattel, capable of following it wherever it may be, only if specifically assessed on that chattel (*Drewry* v. *Baugh and Sons*, 150 Va. 394, 401 (1928); *Chambers* v. *Higgins*, 169 Va. 345, 351–352 (1937)), and that otherwise the right of the tax collector is merely a right to distrain.[13] But it does not appear that each item of furniture was assessed separately. The holding of the Corporation Court was, by analogy to the requirement of description in a chattel mortgage (see *Williamson* v. *Payne*, 103 Va. 551 (1905)), that assessment of the furniture and equipment as a unit was sufficient to establish a specific lien upon them as a unit "so long as they remained on the premises * * *. Had they been divided and removed therefrom no doubt different results would have followed" (R. 34).

[13] This right is made superior to a mortgage lien by Section 381 of the Va. Tax Code, but is inferior to the lien of an execution. *Drewry* v. *Baugh and Sons*, 150 Va. 394 (1928). It may be noted that both the landlord and the city thought that judicial proceedings were necessary to make their liens specific and perfected. Both distrained or attached (see Statement, *supra*, p. 4). Indeed, the landlord claimed priority solely because of the levy of the attachment and distress warrant (R. 22).

We submit that such a lien, accompanied by neither title nor possession, which attaches to the furniture and equipment only for so long as it remains on the premises as a unit, is not, as a matter of federal law, sufficiently specific and perfected to defeat the priority of the United States. The lien for the city's taxes appears to be similar in general character to the lien for state taxes considered in *New York* v. *Maclay*, 288 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480, which were held to be subordinate to the Federal Government's claim (see pp. 13, 14, 15–16, 18, 20–22, *supra*).[14]

III

RECOGNIZING LIENS OF THE CHARACTER INVOLVED IN THE INSTANT CASE AS SUPERIOR TO THE PRIORITY CONFERRED ON THE UNITED STATES BY R. S. 3466 WOULD IMPROPERLY PERMIT STATES TO SUBSTITUTE THEIR OWN PRIORITY SCHEME FOR THAT DIRECTED BY CONGRESS

As this Court reaffirmed in *United States* v. *Emory*, 314 U. S. 423, 426, the purpose of Section 3466 is "to secure adequate public revenues to sus-

[14] State courts have recognized that state statutory liens for taxes, when unaccompanied by a change of title or possession, must yield to the priority established by R. S. 3466. *West Coast Power Co.* v. *So. Kansas Gas Co.*, 20 Del. Ch. 130, 131 (1934); *Matter of Lincoln Chair & Novelty Co.*, 274 N. Y. 353 (1937); *Decker* v. *Decker Building Material Co.*, 118 N. J. Eq. 177, 179 (1935); *Spokane Merchants' Ass'n* v. *State*, 15 Wash. (2d) 186, 188–189 (1942); cf. *Tropical Printing Co.* v. *Union Title Guarantee Co.*, 180 La. 702, 730–732 (1934).

tain the public burden" (*United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35), and it is to be construed liberally in order to effectuate that purpose (*Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, 487). This Court likewise has repeatedly stated that states are without power to establish a priority in conflict with that prescribed by Section 3466 (*Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 90; cf. *Michigan* v. *United States*, 317 U. S. 338, 340). The decision below, we submit, by substituting the state order of priority of payment for that established by R. S. 3466, reaches a result at variance with the imperative language of that Section and the controlling decisions of this Court.

It is, of course, clear that should a state statutory lien, unaccompanied by either title or possession, be held superior to a claim of the United States, it would be possible for a state, by the simple expedient of characterizing certain classes of claims as liens, to substitute its own conception of priority in cases of insolvency for that of Congress. Attempts of states to procure prior payment of their taxes in this manner have been rejected by this Court in the *Spokane County*, *Maclay*, and *Texas* cases. (See also fn. 14, *supra*, p. 24.) The results in those cases accord with the repeated statements of this Court that the

benefits of a federal statute may not be evaded or denied by state statutes or common-law rules. *E. g., Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176; *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95.

It is only when the debtor becomes insolvent that a statutory lien assumes stature. The lienee then becomes entitled to priority in payment out of the assets charged with the lien. *Piedmont Corp.* v. *Gainesville & N. W. R. Co.*, 30 F. (2d) 525, 530 (N. D. Ga.). A state statute providing for priority of payment to certain classes of debts accomplishes the same ultimate result as a statutory lien. Yet state laws granting priority in payment must yield to the priority conferred by R. S. 3466. We submit that a state cannot achieve the same result by indirection. Whether it uses the terminology of lien, or that of priority in distribution, a state cannot by mere statutory declaration override the command of R. S. 3466 as to the priority of the United States over other creditors.[13]

This principle applies to the landlord's lien here in question. In those states which follow the common-law rule, no lien arises until dis-

[13] Thus, the attempts of states to prefer wage claims by a statutory declaration of priority (*Emory* v. *St. James Distillery*, 143 S. W. (2d) 318 (Mo. Ct. of Apps., 1940), reversed, *United States* v. *Emory*, 314 U. S. 423) or by statutory lien (*Ernst* v. *Guarantee Millwork, Inc.*, 200 Wash. 195 (1939), overruled *sub silentio*, *Spokane Merchants Ass'n* v. *State*, 15 Wash. (2d) 186 (1942), were alike unsuccessful in view of R. S. 3466.

traint, which of course effects a change in possession.[16] In other states, by statutory *ipse dixit*, the landlord has a paramount lien by reason of the relationship of landlord and tenant alone. We do not perceive that a state statute which merely provides that such a lien shall be paramount to all other claims (with the usual exception of state and municipal tax liens) changes the inherent nature of the claim or raises its character to that of a specific and perfected lien, entitled to prevail over the priority of the United States. Moreover, it may frequently result, as in the instant case, in enabling state or municipal taxes otherwise uncollectible, owing to the insolvent condition of the debtor and the priority accorded by R. S. 3466, to be paid in full. Cf. *Ferris* v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232 (1924); *State* v. *Wynne*, 134 Tex. 455, 471 (1940).

Accordingly, we maintain that the state statutory liens here in question, which are not specific, and do not divest the debtor of either title or possession, are incapable of defeating the priority of the United States under R. S. 3466, no matter how such liens may be characterized as a matter of state law.

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[16] As the court below remarked (R. 40): "At common law the landlord had no lien upon any property of his tenant as security for rent prior to the levy of a distress warrant. 31 Am. Jur., Landlord and Tenant, Sec. 564, p. 461, and authorities there cited." Cf. *In re West Side Paper Co.*, 162 Fed. 110 (C.C.A. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed and the case remanded with direction that the debt due the United States be the first paid.

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APPENDIX

Section 3466 of the Revised Statutes of the United States (31 U. S. C. 191) provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Virginia Code of 1936 provides:

> § 5519. REMEDY FOR RENT AND FOR USE AND OCCUPATION.—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefor be non-suited, but may use the same as evidence of the amount of his debt or damages. In any

action for rent, or for such use and occupation, interest shall be allowed as on other contracts. (Code 1887, § 2787.)

* * * * *

§ 5522. WHEN AND BY WHOM DISTRESS MADE.—Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff, or sergeant of the county or city wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed. (Code 1887, § 2790; 1902–3–4, p. 664.)

§ 5523. ON WHAT GOODS LEVIED.—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress,

but for not more than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming, or agriculture, and for not more than twelve months' rent if the lands or premises are used for farming or agriculture whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section, nor shall the goods of the undertenant be liable to a greater amount than such undertenant owed the tenant at the time the distress was levied. (Code 1887, § 2791; 1922, p. 863; 1932, p. 696.)

§ 5524. WHEN GOODS NOT TO BE REMOVED WITHOUT PAYING SIX MONTHS' RENT; LIEN FOR TAXES, LEVIES, AND MILITIA FINES NOT AFFECTED.—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used

for residential purposes, and not for farming or agriculture, and not being more altogether than twelve months' rent, if the lands or premises are used for farming or agriculture. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.

For the purpose of this act a monthly or weekly tenancy shall not be construed as a new lease for every month or week of occupation of the premises by the tenant, but his tenancy shall be considered as a continuance of his original lease so long as he shall continue to occupy the property without making any new written lease. (Code 1887, § 2792; 1922, p. 863; 1932, p. 696.)

§ 5527. WHEN DISTRESS NOT UNLAWFUL BECAUSE OF IRREGULARITY, ETC.—Where distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser ab initio; but the party aggrieved by such irregularity or unlawful act may, by action, recover full satisfaction for the special

damage he shall have sustained thereby. (Code 1887, § 2794.)

§ 5528. RETURN OF DISTRESS WARRANTS; PROCESS OF SALE THEREUNDER.—It shall be the duty of each officer who, under the present law may execute warrants of distress, except where it is otherwise provided by law, to make return of his action and proceedings upon such warrants as may be placed in his hands for collection, and file the same with the clerk of the circuit or corporation court of his county or city, as the case may be, except in the city of Richmond the same shall be filed with the clerk of the circuit court, or the clerk of the law and equity court, or the clerk of the law and equity court, part two, within sixty days after the same may have come to his hands, upon the return of such warrant it shall be the duty of such clerk to enter the same upon the execution book of his office after the manner as now provided by law as to executions issued by justices and returned unsatisfied, and the said clerk shall preserve such warrant in his office as is now provided as to such unsatisfied executions. If such return shall show that a levy has been made and that property levied on remains unsold, it shall be lawful for the said clerk of the court in whose office such return is filed to issue a writ of venditioni exponas thereon just as if the said return were upon a writ of fieri facias. (1897–8, p. 755; 1930, p. 456).

* * * * *

§ 5783. FOR WRONGFUL DISTRESS, ETC.—If property be distrained for any rent not due, or attached for any rent not accruing, or taken under any attachment sued out without good cause, the owner of such

property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful seizure, and also, if the property be sold, for the sale thereof. (Code 1887, § 2898.)

* * * * *

§ 6518. WHEN AND HOW FORTHCOMING BOND MAY BE TAKEN; PROPERTY THEN REMAINS IN DEBTOR'S POSSESSION.—The sheriff or other officer levying a writ of fieri facias, or distress warrant, may take from the debtor a bond, with sufficient surety, payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon (including his fee for taking the bond, commissions, and other lawful charges, if any), with condition that the property shall be forthcoming at the day and place of sale; whereupon, such property may be permitted to remain in the possession and at the risk of the debtor. (Code 1887, § 3617.)

§ 6519. HOW TENANT UNABLE TO GIVE FORTHCOMING BOND MAY HAVE DISTRESS WARRANT RETURNED TO COURT AND MAKE DEFENSE THERETO; WHEN OFFICER, IN SUCH CASE, TO TAKE POSSESSION OF PROPERTY LEVIED ON; ITS SALE, WHEN PERISHABLE OR EXPENSIVE TO KEEP.—On affidavit by a tenant, whose property has been levied on under a warrant of distress, that he is unable to give the bond required in the preceding section, and that he has a valid defense under section sixty-five hundred and twenty-two, the officer levying the warrant shall permit the property to remain in the possession and at the risk of the tenant, and shall return the warrant, together with the affidavit, to

the first day of the next term of the circuit court of his county or corporation court of his corporation, and thereupon the landlord after ten days' notice in writing to the tenant, may make a motion before such court for a judgment for the amount of the rent and for a sale of the property levied on, as aforesaid, to which motion the tenant may make such defense as he is authorized to make, under section sixty-five hundred and twenty-two, to an action or motion on the bond where one is given. If, however, after such affidavit is made, the claimant of the rent, or some one for him, shall give bond with sufficient surety, in a penalty double the value of the property levied on, with condition to pay all costs and damages which may accrue to any one by reason of his suing out said warrant, the officer shall take possession of the property and hold the same subject to the order of the court. If the property be perishable, or expensive to keep, the court, or the judge thereof in vacation, may order it to be sold, and on the final trial of the cause, the court shall dispose of the property, or proceeds of sale, according to the rights of the parties. (Code 1887, § 3618; 1902–3–4, p. 839.)

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 925 [illegible] 65

THE UNITED STATES OF AMERICA
Petitioner,

vs.

WADDILL, HOLLAND & FLINN, INC., ET AL.

BRIEF FOR CITY OF DANVILLE (VIRGINIA) OPPOSING PETITION FOR WRIT OF CERTIORARI

E. WALTON BROWN,
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SUBJECT MATTER INDEX

	Page
Opinions below—Supreme Court of Appeals of Virginia	1
Theory of City of Danville	2
Opinions below—Corporation Court of Danville, Virginia	1
Virginia Statutes	4
Argument	7
Appendix	11

CITATIONS

Virginia State Tax Code, §283	5, 14
Same, §293	5, 17
Same, §286	5, 16
Same, §317	5, 17
Same, §378	6, 20
Virginia Constitution, §171	5, 13
Danville City Charter, Chapter 9, §1	4, 11
Same, Chapter 9, §2	11

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BRIEF FOR CITY OF DANVILLE (VIRGINIA) OPPOSING PETITION FOR WRIT OF CERTIORARI

City of Danville, a municipal corporation of the Commonwealth of Virginia, prays that application for a writ of certiorari be denied.

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is officially reported, 182 Va. 351, ... S. E. .....

THEORY OF CITY

The theory of the City is that, under the Constitution, Virginia Statutes, City Charter and Ordinances, annual levies assessed on real estate and tangible personal property located within said City constitute a lien which becomes effective as of January 1 in each year. It is also contended this lien has priority over all other liens, including mortgages, deeds of trust, chattel mortgages and conditional sales contracts, even though such liens were created prior to the beginning of the assessment year. The lien is created by virtue of the assessment against the specific chattels and the levy of the tax on the property.

It is also claimed that no distraint is necessary to perfect the lien; the only object of a distraint for taxes being to enforce the lien by a sale of the property subject thereto.

The total tax bill due the City was $300.55. The State Courts allowed priority as to $222.31 of the claim, as against both the landlord's lien and the debt of the United States. The priority applies only to specific taxes assessed against tangible personal property of Roman's Restaurant consisting "of its furniture and equipment".

No priority was allowed for that portion of the tax bill due the City on merchant's capital, as the tax liability therefor did not arise by the listing and assessment of tangible personal property. A lien for such taxes against specific property must be acquired by distraint or other legal process.

FACTS

The trustee under the deed of assignment took possession of the furniture and equipment located in Roman's Restaurant, 510 Main Street, Danville, Virginia, along with the other assets of the assignor, on June 19, 1941 and sold the property at auction on July 12, 1941. The chattels were not removed from the premises before the auction sale and levy for all City taxes was made on July 2, 1941, (R. 25). The opinion of the learned Judge of the Corporation Court of Danville appears (R. 26-34). The learned Judge decided that the City has a paramount lien for taxes.

> "My conclusion is that as to $222.31 of its claim the City of Danville has priority over both the landlord's lien and that of the United States. That is the amount assessed against 'Roman's Restaurant' on its 'furniture and equipment', less the tax assessed on its 'Merchant's Capital, which was $1.50 for each of the three years in question. Section 5524 subordinates the landlord's lien to the lien of taxes. A tax assessed against a specific chattels is a permanent lien thereon and follows it wherever it may be. *Chambers* v. *Higgins*, 169 Va. 345; *Baugh & Sons* v. *Dreary*, 150 Va. 334. The concrete question then is this: were the taxes assessed against the 'Furniture and Equipment' of 'Roman's Restaurant', '510 Main Street' assessed against a 'specific chattel' or chattels. My search has lead me to no authority on the subject, but

"I think there is an analogue to be found in cases dealing with the sufficiency of the description of property conveyed by chattel mortgages. See *Williamson* v. *Payne*, 103 Va. 551. Following that analogy the City would have a specific and perfected lien. The furniture and equipment assessed for taxation had a definite situs and was used in the conduct of a specific business, and I think that it should be regarded as a unit as far as the assessment is concerned. So long as they remained on the premises where the owner's business was conducted, I think they fell within the fair intendment of the Virginia Statutes discussed in the cases last cited. Had they been divided and removed therefrom no doubt different results would have followed. The City's charter gives it the same rights to a lien for taxes as are given the Commonwealth in its Tax Code. See City Charter, Chapter 9, Sec. 1." (R. 33-34).

The Charter provision referred to is copied in the Appendix to this brief. P. 11.

VIRGINIA STATUTES

In Virginia the State Constitution prohibits the State itself from imposing any property tax for State purposes on real estate or tangible personal property, except rolling stock of public service corporations. Both real estate and tangible personal property, with

the exception noted, are expressly segregated for, and made subject to, local taxation only. Virginia Constitution §171. Tangible personal property segregated for local taxation only is classified by State Statute. §283 State Tax Code. (See A._____).

Every taxpayer, owning property subject to local taxation, is required by Statute to return such property as of January 1 of each year to the local Commissioner of the Revenue on forms prescribed by the State Department of Taxation. Such returns must be filed on or before June 1 of each year and such property is returnable for taxation as of January 1 preceding. The status of all taxpayers liable for local taxes and levies on his property is fixed, as of January 1 each year, and the value of all such property is taken as of that date. §280, State Tax Code. (See A._____)

By Section 293 of the Tax Code annual levies are ordered made by the council of every city "upon any property therein subject to local taxation and not expressly segregated to the State for the purposes of State taxation only." This levy upon property therein subject to local taxation, and not expressly segregated to the State for purposes of State taxation only, completes the assessment and liens the specific property assessed. (See A._____)

By Section 317 of the Tax Code provision is made for the form of a personal property book to be prescribed by the State Department of Taxation and to be furnished each commissioner of the revenue. (See A._____)

This Section further provides that upon this per-

sonal property book shall be entered the name of the property owner and assessments made against him of all taxable, tangible and intangible personal property and other subjects of taxation not required to be assessed on some other book or form.

Section 378 of the Tax Code provides:

> "Any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable, or collector. In all cases property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes thereon." (See A. .....)

This statute gives the right of distress against a person's goods or chattels for his tax liability both as to taxes actually assessed on the particular property and as to his general tax liability. However, as to property on which taxes are assessed, the right of distraint makes the goods liable in the hands of any person for taxes assessed thereon. The lien is good even as against a purchaser for value.

Section 5524 of the Virginia Code, copied in Petition for writ (A. 15), expressly recognizes that a "lien for taxes, levies, or militia fines" has priority over the landlord's lien for rent.

ARGUMENT

It is contended for the City of Danville that as to assessments of taxes made by the commissioner of revenue on specific items of tangible personal property pursuant to annual levies made by the City Council a lien attaches on such specific personal property by operation of law from January first of each year and that this lien has priority over any existing liens by deed of trust or otherwise.

Inasmuch as this lien attached as of January first and the debt of the United States was not acquired by it until after that date the tax lien has priority.

The assessment of local taxes against real estate and tangible personal property is effected by quasi-judicial acts which require (1) the determination, by the commissioner of the revenue, of the assessed value of the property, (2) the levy of the tax thereon at the rate prescribed for each $100.00 of value. This determines the amount of tax liability. These steps result in the assessment.

There seems to be a substantial distinction, however, between the right to lien property by judicial process for a contractual or general tax liability and an actual tax lien created by an assessment against the property itself. Of course a judicial proceeding to acquire lien for a general tax liability is a proceeding *in personam*. The lien results from the judicial proceeding, whereas a proceeding to enforce an actual lien against property is one *in rem*. Therefore, an actual specific lien on the *res* must be distinguished from the right to acquire a lien under judicial process based upon a personal judgment against the person liable. A proceeding to

enforce a lien does not require the rendition of a personal judgment against the defendant but may be enforced by an *ex parte* proceeding *in rem*.

In *United States v. Texas*, 314 U. S. 48, 86 L. ed. 35[illegible], the Texas statute declared that all gasoline taxes due by any distributor to the State "shall be a preferred lien, first and prior to any and all other existing liens, upon all the property of any distributor, devoted to or used in his business as a distributor. . . ." That lien was described as an inchoate and general lien as distinguished from a specific and perfected lien. To have perfected such a lien would have required a judicial proceeding *in personam* because the fact of ownership of the property on which the lien was sought to be established had to be determined as well as the amount of tax liability and some judicial process had to issue against the person liable.

That situation is readily distinguishable from a specific property tax actually levied and assessed against the land or tangible personal property listed on the assessment rolls.

If the State Courts determine that under local law a lien has been created by contract or statute against specific property, real or personal, and that this lien is enforceable by a proceeding *in rem* as distinguished by a proceeding *in personam*, surely there can be no question that under R. S. 3466 the United States would not be entitled to priority on its general claim for debt which is not supported by a specific lien on the *res*.

It is stated that at common law there could be no lien without possession but that this was not so in maritime law or in equity.

Peck v. *Jenness*, 7 How. 612.

Statutory liens without possession have the same efficacy as common law liens with possession.

Beall v. *White*, 94 U. S. 382, 24 L. ed. 173.

Priority of lien gives priority of legal right.

Hazard v. *Milwaukee, etc., Company*, 101 U. S. 837, 25 L. ed. 1081.

It is the very nature and essence of a lien that no matter into whose hands the property goes it passes *cum onere*.

Burton v. *Smith*, 13 Pet. 464.

The writ of distress is an extra-judicial remedy, and consists of the act of taking movable property out of the possession of the owner to compel the performance of an obligation. The lien is not created by distraint. Usually property is distrained by process issued by a justice upon application of the tax collector. The purpose of this writ is to take possession of the property, to make sale thereof and make return of the writ showing to what extent the distress is satisfied by a sale of the property. It is a proceeding *in rem* against the property as distinguished from a proceeding *in personam* against the owner.

Whether liens are specific and have attached to the *res* is a State question and not a Federal question and should be controlled by the decisions of the State courts.

Spokane County v. *United States*, 279 U. S. 80-95, 73 L. ed. 621-626.

REVISED STATUTE 3466; 31 U.S.C.A. 191

This Statute does not create any lien in favor of the United States. Its original purpose was to provide more effectually for the settlement of accounts between the United States and receivers of public money, and to give debts due the United States a preference over other debts due general creditors by receivers of public money. It has been extended by construction to protect the United States in the collection of debts due it even as against the claims of a State which had priority under State law. The Statute has also been construed to give the United States priority even as against liens created under State law in cases where it is considered that the lien is inchoate and not specific because some judicial process is necessary to enforce the lien.

While under the Statute the United States is entitled to have debts due it satisfied before distribution is made to general creditors of an insolvent's estate, it is submitted that Congress never intended and is without constitutional power to deprive a lien holder of his property right in the lien by giving debts due the United States priority over such liens in the distribution of an insolvent's estate. It is therefore urged that the application for the writ should be denied.

Respectfully submitted,

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APPENDIX

CHARTER OF THE CITY OF DANVILLE, Chapter 9:

Sec. 4. Lien for taxes; enforcement; failure of collector to collect and pay over taxes.

"There shall be a lien on real estate for the city taxes assessed thereon from the commencement of the year for which they are assessed. The collector of taxes of said city may distrain and sell therefor in like manner as a sergeant or city treasurer or other collector may distrain and sell for state taxes, and shall have in other respects, like power to enforce the collection of all taxes and assessments properly placed in his hands for collection.

"The council may require the real estate in said city which is delinquent for non-payment of taxes to be sold for the same, with interest thereon and such per centum as it may prescribe for charges and expenses of sale and collection, and may regulate the terms on which real estate may be sold or redeemed; provided, that such sales shall be made after the manner prescribed by general law.

"The council of the city of Danville may provide by ordinance now in force, or hereafter adopted, for the collection of city taxes and levies on real estate and tangible personal property in installments, at such times, with such penalties for delinquent payments, and with such interest at not exceeding the rate of six percentum per annum upon the principal and penalties of all such taxes and levies or installments thereof from the date such taxes or installment thereof respectively become

due, as may from time to time be fixed and prescribed by ordinance.

"Should the collector of the city taxes, or other person designated to receive same, fail to collect and pay over the said taxes at the time prescribed by the council, he and the sureties on his bond given for the faithful discharge of his duties, their executors and administrators, shall be liable therefor and the same may be collected or enforced by motion or action or other remedy prescribed by general law before the corporation court of the city of Danville." (Act of General Assembly of Virginia 1889-90, page 407; same 1940, page 160.)

Sec. 2. Powers to be vested in collectors of revenue; enforcement of taxes against mortgaged property; persons about to remove or dispose of taxed property.

"The council may vest in the collector of city taxes and assessments, the collector of water rates, rents or assessments and any other collector of sums due to the city which it may appoint, any or all of the powers which are now or may be hereafter vested in any collector of state taxes, and may prescribe the mode of his proceeding, and the mode of proceeding against him for failure to perform his duties. No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the possession of the grantor nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for

taxes assessed thereon, no matter in whose possession they may be found. And in the event it is evident that the party or persons owing said taxes, or the person in possession of the goods and chattels upon which said taxes have been assessed, is about to abscond, remove said goods and chattels beyond the jurisdiction of the corporation court of said city, or make way with, or dispose of said goods and chattels, with the design of avoiding the payment of said taxes, then said collector may levy upon or distrain and sell said goods and chattels for the payment of said taxes then due in the same way and with the same effect as he would be authorized to do, on or after the first day of December of the year in which said taxes accrued."

(Acts of General Assembly of Virginia 1889-90, page 407).

CONSTITUTION OF VIRGINIA:

SEC. 171. Segregation of realty and tangible personalty for local taxation; exception.—

"No State property tax for State purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or reassessed for local taxation in such manner and at such times as the general assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

THE TAX CODE, CHAPTER 19, Tangible Personal Property, Machinery and Tools, and Merchants' Capital.

Sec. 283. Tangible personal property segregated for local taxation only; classification.— Tangible personal property having been segregated by law for local taxation only, the classification hereunder shall be as follows:

"1. The aggregate number of horses, mules and other kindred animals, and the value thereof.

"2. The number of cattle, and the value thereof.

"3. The number of sheep and goats, and the value thereof.

"4. The number of hogs, and the value thereof.

"5. The aggregate number and value of all automobiles, motor trucks, motorcycles, and all other motor vehicles.

"6. The aggregate value of all animal drawn vehicles and bicycles.

"7. The aggregate value of all farming implements and tools of mechanics.

"8. The aggregate value of all felled timber, ties, poles, cord wood, bark, and other timber products, and all agricultural products, in the hands or possession, legal or constructive, of a purchaser, provided that grain, tobacco and other agricultural products in the hands of a producer of the same are hereby declared exempt from taxation as property under this section.

"9. The aggregate value of all household and kitchen furniture, including gold and silver plates, plated ware, watches and clocks, sewing machines, refrigerators, automatic refrigerating machinery, vacuum cleaners, and all other household machinery, books, firearms and weapons of all kinds.

"10. The aggregate value of all pianos, organs, victrolas, phonographs, and records to be used therewith, and all other musical instruments of whatever kind, radio instruments and equipment.

"11. The aggregate value of all oil paintings, pictures, statuary, curios, articles of virtue and works of art.

"12. The aggregate value of all diamonds, cameos, or other precious stones, and all precious metals as ornaments or jewelry.

"13. The aggregate value of all boats, or water craft under five tons burthen used for business or pleasure.

"14. The aggregate value of all ships, tug boats, barges, boats, or other craft of five tons burthen or over, and all other floating property, not required to be assessed by the State corporation commission, used for business or pleasure, together with their tackle, rigging, furniture, and all else that pertains to them, or of any share or interest therein, though the said boats or other water craft or any one of them, may not be at the time of the assessment in the waters of the State of Virginia.

"15. The aggregate value of all other tangible personal property not herein specifically enumerated, including the value of all seines, pound nets, fykes wires and other devices for catching fish, and the aggregate value of all toll bridges, turnpikes and ferries, except steam ferries owned and operated by a chartered company, and the value of all poles, wires, switchboards, et cetera; telephone or telegraph instruments, apparatus, et cetera, owned by any person, firm, association or company not incorporated.

"No property shall be assessed as tangible personal property which the law classifies as intangible personal property." (Tax bill, § 6; 1910, p. 487; 1924, p. 396.)

Sec. 280. Department of taxation to prescribe and furnish blank forms of returns for reporting property mentioned in this chapter; tax payers to file returns with commissioners of the revenue.—

"Blank forms of returns for reporting the classes of property mentioned in this chapter shall be prescribed by the department of taxation and furnish to the several commissioners of the revenue in ample time for their use. Every taxpayer owning any of the property mentioned in this chapter on January first of any year shall file a return thereof with the commissioner of the revenue for his county or city on the forms so prescribed. Such returns shall be filed on or before June first of each year, except that in the year nineteen hundred and twenty-eight, they may be filed on or before July first. Tangible personal property, machinery and tools, and merchants' capital shall be

returned for taxation as of January first of each year. The status of all persons, firms, corporations and other taxpayers liable to taxation on any of such property shall be fixed as of the date aforesaid in each year, and the value of all such property shall be taken as of such date. Every fiduciary shall file the returns mentioned in this section with the examiner of records having jurisdiction."

CHAPTER 20. Local Levies

Sec. 293. Cities and towns to make city and town levies.—

"The council of every city and town shall annually cause to be made up and entered on their journals an account of all sums lawfully chargeable on the city or town which ought to be paid within one year, and order a city or town levy of so much as in their opinion is necessary to be raised in that way in addition to what may be received for licenses and from other sources. The levy so ordered may be upon the persons in the said city or town above the age of twenty-one years, not exempt by law from the payment of the State capitation tax, and upon any property therein subject to local taxation and not expressly segregated to the State for purposes of State taxation only." (Code 1919, §3073.)

CHAPTER 21. Commissioners of the Revenue.

Sec. 317. Personal property book, form of and what to be entered therein.—

"The department of taxation shall prescribe the

forms of the personal property book to be used by the commissioner of the revenue, and shall furnish each commissioner of the revenue with three copies of blank personal property books prepared in the form so prescribed.

"The personal property book shall be so arranged that personal property owned by white persons shall be assessed with taxes and levies in one part of the book, and personal property owned by colored persons shall be assessed with taxes and levies in another part of the book.

"In making out these books, the commissioner of the revenue shall arrange them alphabetically to show the persons chargeable with taxes with refereince to the first and each subsequent letter of each name, and where there are two or more persons of the same name, he shall use some distinguishing sign by which the taxpayer may be identified. The post office address of each taxpayer shall be given.

"The commissioner of the revenue shall, in making out the original personal property book and the two copies thereof, follow strictly the form prescribed.

"Upon the personal property book shall be entered the name of each person, twenty-one years of age or over, not pensioned by this State for military services, and a State poll tax of one dollar and fifty cents shall be assessed thereon against each such person; and all taxable tangible and intangible personal property and all other subjects of taxation not required by or in pursuance of law to be assessed on some other book or form.

"Nothing herein contained shall be construed as prohibiting the department of taxation from prescribing a separate personal property book for the assessment of State taxes and a separate personal property book for the assessment of local levies.

"All supplemental assessment sheets of every kind prescribed by the department of taxation and used for the assessment of taxes and levies during any current tax year after the regular assessment books have been completed shall be disposed of in the same manner as the regular assessment books were disposed of, and such supplemental sheets shall be the assessment sheets for the assessment of such taxes and levies."

(Code 1919, §2309.)

CHAPTER 24. County and City Treasurers, and the Collection of Taxes.

SEC. 378. What may be distrained for taxes; fees of officers, notice to tenant.—

"Any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable, or collector. In all cases property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes thereon. Any timber or wood growing on the land belonging to the person or estate assessed with taxes or levies may be distrained and sold, so far as necessary, to pay the amount of such taxes and levies and expense of sale, and shall be sold standing in the manner prescribed for the sale of goods and

chattels, other than horses, mules, and oxen, under distress or levy for taxes; and the purchaser shall have the right to cut and carry away such wood or timber within twelve months after the purchase of the same, with the right of ingress and egress for this purpose, but shall not haul the same over any lands occupied at the time by growing crops. Any real estate in the county or corporation belonging to the person or estate assessed with taxes or levies due on such real estate, may be rented or leased by the treasurer, sheriff, constable, sergeant, or collector, privately or at public outcry; after due publication, in the discretion of such treasurer, sergeant, sheriff, constable, or collector, either at the front door of the courthouse or on the premises, or at some public place in the community where the premises are situated, after giving not less than fifteen days' notice by printed or written notices posted at the front door of the courthouse, and at three or more places in the neighborhood of the real estate to be leased. Such leasing shall be for a term not exceeding one year, and for cash sufficient to pay the taxes or levies due on the real estate so rented, and the costs and charges of advertising and leasing. When a lease is effected, the treasurer, sergeant, collector, sheriff or constable leasing such real estate, shall put the lessee in possession thereof, and for such purpose shall have like powers as those exercised by a sheriff acting under a writ of possession. When the treasurer, constable, sheriff, sergeant, or collector advertises and leases, or advertises without leasing, a parcel of real estate under this section, he shall receive a fee of sixty cents, to be paid as a part of the cost of

this proceeding. The board of supervisors or other governing body of any county may, by resolution adopted by a majority of the members thereof by a recorded yea and nay vote, postpone the time when any real estate in such county may be rented or leased for the taxes and or local levies for any year, until after the fifteenth day of November of the next succeeding year. In all cases where a sheriff, constable, collector, treasurer, sergeant, or other collecting officer, has to levy or distrain and sell, or levy or distrain without selling, he shall receive a fee of sixty cents, to be collected with the taxes. But in no case shall any of these fees be paid by the State. When real estate is advertised for leasing for the taxes and there is any tenant in possession of the property so advertised, then the treasurer, sheriff, sergeant, constable, collector, or other collecting officer making the lease, shall serve upon such tenant, at least five days prior to the day of leasing, a copy of the notice of leasing. This service shall be in conformity with section six thousand and forty-one of the Code of Virginia." (Code 1919, Sec. 2439; 1926, p. 1000; 1934, p. 356.)

FILE COPY

IN

The Supreme Court of the United States

October Term, 1944

No. 65

THE UNITED STATES OF AMERICA, Petitioner

v.

WADDILL, HOLLAND & FLINN, INC., et al.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR WADDILL, HOLLAND & FLINN

J. P. TOWNES PTG. CO., DANVILLE, VA.

INDEX

	Page
Question presented	1
Statutes involved	1
Statement	2
Summary of argument	2
Argument:	
Introductory	2
I. The provisions of the Virginia statutes create a lien for the landlord which is specific, perfected and unconditional and entitles the landlord to priority in payment over the claim of the United States	3
1. Distraint and attachment not necessary to perfect landlord's lien	5
2. Landlord's lien is prior to other liens attaching after the tenancy	7
3. The lien of the landlord is superior to the claim of the United States	7
II. Reply to the contention of the United States that the landlord's lien is insufficiently specific to prevail over the claim asserted by the United States	9
1. The estate and title of the tenant in his goods on the leased premises is diminished to the extent of rent due or to become due	9
2. Is the amount of the rent claim specific?	10
3. Are the goods subject to the lien specific?	12
4. To what extent is the assistance of the Courts necessary for the enforcement of the landlord's lien?	13
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Allen v. Parkey, 154 Va. 739, 149 S. E. 615	3, 7
American Exch. Bank v. Goodlee, etc. 135 Va. 204, 116 S. E. 595	13
Anderson v. Henry, 45 W. Va. 319, 31 S. E. 998	3, 5, 6
Bradford v. Graham, 287 F. 686	3, 5
Brent v. Washington, 10 Pet. 596, 611	10
Jackson v. Oddie, 2 Mart. N. S. 555	8
Lott v. Salsbury, 237 F. 191	3, 5
McIntire, In Re, 142 Fed. 593	3, 6
New York v. Maclay, 288 U. S. 290	9
Richmond v. Duesberry, 27 Gratt (68 Va.) 210	4
Spokane County v. United States, 279 U. S. 80	9

Citations—continued Page

Thelusson v. Smith, 2 Wheat. 396 8

United States v. Knott, 298 U. S. 544 9

United States v. Texas, 314 U. S. 480 9

Wades v. Figgatt, 75 Va. 575 3

Wynn, In Re, 30 Fed. Cas. 752, 762 ..... 3, 5, 7, 8

Statutes:

Virginia Code of 1936:

Sec. 5519 15

Sec. 5522 ..... 11, 16

Sec. 5523 ..... 3, 12, 16

Sec. 5524 ..... 4, 10, 12, 17

Sec. 5527 18

Sec. 5528 ..... 11, 19

Sec. 5783 20

Sec. 6518 20

Sec. 6519 ..... 11, 20

Revised Statutes, Sec. 3466 (31 U. S. C. sec. 191) 15

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THE UNITED STATES OF AMERICA, Petitioner

v.

WADDILL, HOLLAND & FLINN, INC., et al.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR WADDILL, HOLLAND & FLINN

Question Presented

Whether in a general deed of assignment proceeding the landlord, by the force and effect of the statutes creating his lien, is preferred as against a claim of the United States asserted under Section 3466 of the Revised Statutes.

Statutes Involved

Statutes of the State of Virginia, Sections 5519, 5522, 5523, 5524, 5527, 5528, 5783, 6518 and 6519 and Section 3466 of the Revised Statutes of the United States are set forth in the Appendix, infra, pp. 15-22.

Statement

The facts are substantially stated in the appellant's brief. There should be mentioned, however, that between the date of the execution of the deed of assignment, June 19, 1941, and the date of sale by the trustee, July 12, 1941, all the property conveyed in the deed of assignment remained on the demised premises and that the property distrained and attached by the landlord on July 1, 1941 was on said premises at that time.

Summary of Argument

The statutes of the State of Virginia give to the landlord a specific and perfected lien on the property of the tenant. These statutes for all practical purposes diminish the estate of the tenant to the extent of the rent lien. Distraint or attachment is not necessary to perfect the lien, but are methods of enforcement. The type of lien created by said statutes meets the test of priority as laid down by the United States Courts in determining whether the United States has precedence under Section 3466. The lien of the landlord as given by the Virginia Statutes is superior to the claim of the United States.

Argument

Introductory—The decision of the Court below is not in conflict with decisions of this Court. The specific question has not heretofore been decided, but where the Virginia statutes and similar ones have been construed by the United States Courts and by the Courts of Virginia and West Virginia there has been uniformity of opinion that the

statutes create in favor of the landlord a lien of a high and peculiar character, specific and unconditional, regardless of actual distraint. In Re Wynn, 30 Fed. Cas. 752, 762; **Lott v. Salsbury,** 237 F. (4th Cir) 191; **Bradford v. Graham,** 287 F (4th Cir) 686; **Anderson v. Henry,** 45 W. Va. 319, 31 S. E. 998; **Wades v. Figgatt,** 75 Va. 575; **In Re McIntire,** 142 Fed. 593; **Allen v. Parkey,** 154 Va. 739, 149 S. E. 615.

I

The provisions of the Virginia statutes create a lien for the landlord which is specific, perfected and unconditional and entitles the landlord to priority in payment over the claim of the United States.

Reference to the statutes will indicate the high character of the lien given to the landlord by such provisions as:

(A) If any other lien be created on the goods and chattels of the tenant while they are upon the leased premises or within 30 days thereafter, the landlord's lien takes precedence over such other lien for six months rent where premises are not used for agriculture. Section 5523—appendix pp. 16, 17.

(B) If, after the commencement of any tenancy, a lien be created on the goods and chattels of the tenant by deed of trust, mortgage or otherwise, the party having such lien may not remove the goods from the premises unless and until he pays the landlord so much of the rent as is in arrear and securing so much as is to become due, not to exceed in all six

month's rent where premises are not used for agriculture. Sec. 5524, appendix pp. 17, 18.

(C) If, after the commencement of any tenancy the goods on the premises leased are sold, the purchaser may not remove said goods unless and until he pays to the landlord so much of the rent as is in arrear and securing so much as is to become due, not to exceed in all six month's rent where premises are not used for agriculture. Sec. 5524, appendix pp. 17, 18.

(D) If, after the commencement of any tenancy the goods are taken under legal process the officer executing it shall, out of the proceeds of the goods, make such payment of rent as is in arrear and as to the rent to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers' bonds with good security, payable to the person so entitled and delivering such bonds to him. Sec. 5524, Appendix, pp. 17, 18.

(E) If the goods be not taken under legal process, the payment and security referred to in the preceding paragraph shall be made and given before their removal. Sec. 5524, Appendix pp. 17, 18.

The landlord is protected by the statute against all deeds of trust, mortgages and other liens, where the lien has been created after the commencement of the tenancy, upon goods on the leased premises, which belong to a person liable for rent. **Richmond v. Duesberry,** 27 Gratt. (68 Va.) 210. He must be paid before removal under such deed of trust, mortgage

or other lien, all rent in arrear and secured what has not fallen due not exceeding six month's rent where the premises are not used for agriculture. It gives the landlord right of payment and preference out of the goods themselves. It gives right to the landlord to detain the goods on his premises against a removal of trust until paid or secured as prescribed. If removed under legal process it says that the officer, though he may remove them, shall, out of the goods, pay rent in arrear, and sell enough on a secured credit to pay the balance when due. **Anderson v. Henry,** 45 W. Va. 319, 31 S. E. 998.

Speaking of the Virginia statute, Chief Justice Chase while sitting on appeal in the Circuit Court in the case of In Re Wynn 30 Fed. Cas. 752, 762, said, " . . . We cannot doubt that this statute creates a lien in favor of the landlord and lien of a high and peculiar character . . ."

In **Bradford v. Graham,** 287 F. 686 (4th Circuit) it was held that under the Virginia statute the landlord is given a preferred, specific and fixed lien, a lien that is unconditional and of a high order.

Likewise in **Lott v. Salsbury,** 237 F. 191 (4th Circuit) the Court held that the statutes of Virginia give the landlord a specific lien upon any goods upon the leased premises for rent, which is good against lien creditors for the period fixed in the statutes.

I. **Distraint and Attachment not necessary to perfect landlord's lien.**—It was the opinion of the Court in **Bradford v. Graham,** 287 F. 686 (4th Circuit) that distraint or attachment is not necessary to perfect

the lien. This statement is made by Circuit Judge Waddill, ". . . And it is equally clear that this lien is unconditional and of a high order, requiring the issuance of no process of distraint, or attachment to perfect the same . . . We think under the Virginia statute and decisions, that the landlord is given a preferred, specific and fixed lien for not exceeding one year's rent upon all of the goods and property upon the demised premises, and for which, when past due, distraint may be made at will; that such lien is subject to no limitation or qualification whatever, save taxes, etc."

Again referring to **Anderson v. Henry** 45 W. Va. 319, 31 S. E. 998, it was there held that under the West Virginia statutes, similar to those of Virginia, distraint was not necessary to perfect the lien. It was pointed out in that case that in at least one instance the statute apparently prohibits distraint or attachment where the goods are levied upon by an officer in executing a writ of fi fa or other legal process. To prevent a clash between process and distraint—a seizure out of the officer's hands by an officer under distress warrant subsequently issued, whether for rent due at the removal or afterwards becoming due—the statute allows the officer to remove the property from the premises under legal process, but requires him to pay the rent out of the sale of the goods.

In Re McIntire, 142 Fed. 593, followed and approved **Anderson v. Henry,** supra. In the McIntire case the Court construed the decision in **Anderson v. Henry** to mean that the landlord in West Virginia

has a lien on the tenant's goods carried on the premises over all liens by deed of trust, mortgage or otherwise, created after the tenant's term, whether distress therefor has issued or not.

The Circuit Court in reviewing the Virginia statutes **In Re Wynn,** 30 Fed. Cas. 752, 762, did not deem it necessary that there be distraint in order to vest or perfect the lien. It was there held that the lien of the landlord is given by statute independently of proceedings by distress warrant or attachment.

In **Allen v. Parkey,** 154 Va. 739, 149 S. E. 615, the Supreme Court of Appeals held that distraint was not necessary to vest the lien for rent.

II. **Landlord's lien is prior to other liens attaching after the tenancy.**—The specific provisions of the Virginia statute prohibit the removal of goods from leased premises by a party having a lien by way of deed of trust, mortgage or otherwise, until the rent is paid or secured as therein specified, if the lien accrued after the goods were placed on the premises.

III. **The lien of the landlord is superior to the claim of the United States.**—The United States has no lien upon the property of an insolvent debtor, but merely a right of priority in payment out of his estate in the hands of his assignee or other representative. It has been held that the lien of a landlord upon the property of the debtor is superior to the right of priority of the United States and of the surety on the bond of a debtor to the United States, the Court basing its decision on the ground that the lien of a mortgagee

or pledgee on the property of the debtor would not yield to the claim of the United States and that the legal lien of the landlord is not weaker than that of the mortgagee or pledgee. **Jackson v. Oddie**, 2 Mart. N. S. 555.

The holding of this Court in **Thelusson v. Smith**, 2 Wheat. 396 was that there would be an exception to the right of the United States to priority where the debtor had made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi fa, concluding that this would be such a divestiture out of the debtor as to preclude any claim of the United States. The lien of the landlord being superior to that of a mortgage created after the tenancy and superior to the lien of a fi fa it would appear that the landlord's lien would come ahead of the claim of the United States. It would be a strange rule which accorded priority to the deed of trust or mortgage creditor over the claim of the United States and yet denied it to the landlord when the deed of trust or mortgage creditor is by positive enactment postponed to the landlord's claim. Although a claim of the United States was not involved in the case of **In Re Wynn**, 30 Fed. Cas. 752, 762, Chief Justice Chase in referring to the type of lien given the landlord under the statutes of Virginia, said, ". . . Would it not be trifling with the plain sense of words to say there is a lien under the trust and a lien under the execution but the claim (rent) which by law is made superior to either is no lien."

II

Reply to the contention of the United States that the landlord's lien is insufficiently specific to prevail over the claim asserted by the United States.

It is the contention of the United States that the landlord's lien is not sufficiently specific to override the claim of the government. They argue that the state statutes do not divest the tenant of either title or possession; that the debt secured is not specific; that the goods subject to the lien are not specific; and that a court proceeding is necessary for enforcement of the lien.

It will be observed that none of the statutes considered in the cases of **United States v. Texas,** 314 U. S. 480; **New York v. Maclay,** 288 U. S. 290; **Spokane County v. United States,** 279 U. S. 80 and **United States v. Knott,** 298 U. S. 544 are even remotely similar to the statutes of Virginia relating to a landlord's lien for rent. In most of those cases the conflict was between federal and state or county governments as to the priority of tax claims.

I. **The estate and title of the tenant in his goods on leased premises is diminished to the extent of rent due or to become due.** Goods and chattels of the lessee on leased premises cannot be removed therefrom by a purchaser, mortgagee or the holder of any other lien acquired after the tenancy unless the rent due is paid and that to become due is secured, in all six month's rent where the premises are not used for agriculture. Nor can the goods be removed from the premises, except under legal process, without the rent being paid and secured as specified in the

statute. Section 3524, Appendix pp. 17, 18. Even if removed under legal process the rent must be paid and secured out of the goods by the officer. When the goods of the tenant are placed upon the premises they immediately become liable for the payment of rent. The landlord acquires a specific interest in the chattels and the title of the tenant is divested to that extent and likewise the estate of the tenant is for all practical purposes diminished to that extent. The lessee's equity in the goods is all that would be available to other creditors. The tenant cannot remove the goods without paying or securing the rent, neither can a purchaser or a lienholder acquiring lien after the tenancy. These provisions of the Virginia statute would appear to considerably disturb the title and possession of the tenant. In **Brent v. Washington,** 10 Pet. 596, 611, it was held that a claim of the United States against certain bank shares was inferior to that of the bank as against the stockholder of the bank who was indebted to it, because of a charter provision giving the bank a lien on its shares issued to a shareholder becoming indebted to it, on the theory that the bank could effectively prevent a transfer of its shares under such circumstances. This is somewhat similar to the instant case where the statute forbids the removal of goods until the rent is paid or secured.

II. **Is the amount of the rent claim specific?**—The lien of the landlord against the goods and chattels on the premises extends to cover six months rent, past due or to become due, where the premises are not used for purposes related to agriculture. Such tenancies are always based upon a stipulated rental,

usually payable monthly. The amount of any arreage in rent would of course be likely to change from month to month, but others, including the tenant, are charged with notice that the goods and chattels are subject to a lien for six month's rent and the exact amount thereof is easily ascertainable at any given time. A judicial proceeding is not necessary to determine the amount. Distraint is founded on a warrant issued by a justice upon affidavit by the landlord of the amount of rent due. The warrant is not served on the tenant. The officer makes a levy, advertises and sells the goods and returns the warrant to the Clerk's Office showing disposition of the proceeds of sale. The warrant is not docketed and no judicial determination of the amount of rent due is ever made, unless the tenant files affidavit of substantial defense denying that he owes the rent, as provided for in one of the statutes. Sections 5522, 5528, 6519, appendix pp. 16, 19, 21. The steps taken to enforce the landlord's lien are more or less summary, much more so than in proceedings to enforce a mortgage or a vendor's lien in Virginia. If a party holding a mortgage desires to have the property sold he must institute a suit in chancery and have a report of liens by a Commissioner in Chancery. The amount due on the mortgage must be proved before the Commissioner and decree must be entered setting forth the amount due on said mortgage. Likewise in case of a vendor's lien on property, the enforcement thereof requires a suit in chancery and procedure similar to that in a suit to foreclose a mortgage. In each instance the amount due on the secured debt must be proved before and ascertained by the Court. How-

ever, the amount of the landlord's lien is not left to determination by the Court. It is founded solely on the affidavit of the landlord. True, there is a provision that the tenant may file with the officer, when he comes to make the levy, an affidavit of substantial defense and thus bring on a hearing, but every lien is subject to being contested and the mere fact that there is a provision in the statutes to the effect that the tenant may protect himself if a landlord wrongfully distrains for rent should not vitiate the force and effect of the lien given to a landlord. As a practical matter it is seldom that a tenant can in good faith file an affidavit of substantial defense to the claim of the landlord. For the foregoing reasons it is submitted that the landlord's claim is sufficiently specific to override the claim of the United States.

III. Are the goods subject to the lien specific?—Section 5523 of the Virginia statutes, Appendix pp. 16, 17, provides that any of the goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days, are subject to levy under distress warrant. Therefore, all of such goods are subject to distraint, not a part thereof, but all such goods on the premises. Section 5524 of the Virginia statutes, Appendix pp. 17, 18, prohibits the removal of such goods by the tenant, a mortgagee or other lien holder acquiring a lien after the tenancy, and by a purchaser unless and until the rent due or to become due is paid or secured. It has been held that a lienholder removing goods from leased premises, without paying and securing the rent, is personally

liable for the value of the goods removed by him from the premises, to the extent of the rent due and owing the landlord, although the landlord had not distrained or attached the goods prior to their removal or within thirty days thereafter. **American Exch. Bank v. Goodlee**, etc. 135 Va. 204, 116 S. E. 505. It would, therefore, seem that the lien is sufficiently specific as to the property subject thereto.

IV. **To what extent is the assistance of the Courts necessary for the enforcement of the landlord's lien?** —It is not necessary to invoke the aid of a court of law or chancery, in the usual sense, in the enforcement of the lien of a landlord. The distress warrant issues as a matter of course from a justice upon the filing of affidavit by the landlord showing the amount of rent due. No process is issued on the warrant. It is directed only to the sheriff, sergeant or constable with direction to make the rent out of the goods on the leased premises. The warrant is not docketed or set for hearing. The officer returns the warrant to the Clerk's Office showing his action under the warrant and the Clerk preserves the warrant as in case of certain executions. If the tenant desires to contest the distraint, he may file with the levying officer an affidavit of valid defense, in which event there would be a hearing on the matter. This merely gives the tenant the right to protect himself against an unlawful claim and is not designed to interfere with the summary procedure followed in enforcing the lien of a bona fide claim for rent. The distress warrant is not returnable as a matter of course, in court, as indicated in the brief of appellant on page 20. Not unless the tenant gives affidavit that

he has a valid defense and hands the same to the levying officer is there any real judicial proceeding. Upon the giving of such affidavit the officer returns the warrant and affidavit to the first day of the next term of court and thereafter motion may be made for judgment.

Every lien requires some method of enforcement. The mortgage lien and the vendor's lien, both liens of high dignity, cannot be enforced without the aid of a court of chancery. The deed of trust lien which is commonly used, requires execution thereof by the trustee. If the trustee proceeds improperly or if the debtor has any valid defense to the debt or a part thereof he may invoke the aid of a court of equity.

It is submitted that the usual and normal method to enforcing the landlord's lien for rent does not in reality invoke the aid of a court and even if so it cannot be said to affect the lien insofar as it is specific and perfected.

Accordingly, we maintain that the landlord's lien here in question is specific and perfected and takes priority over the claim of the United States.

Conclusion

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

RUTLEDGE C. CLEMENT,
Attorney for
WADDILL, HOLLAND & FLINN, Inc.

October, 1944.

APPENDIX

Section 3466 of the Revised Statutes of the United States (31 U. S. C. 191) provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Virginia Code of 1936 provides:

> § 5519. **Remedy for rent and for use and occupation.**—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefor be non-suited, but may use the same as evidence of the amount of his debt or damages. In any action for rent, or for such

use and occupation, interest shall be allowed as on other contracts. (Code 1887, § 2787.)

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§5522. **When and by whom distress made.**—Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff, or sergeant of the county or city wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress, may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed. (Code 1887, § 2790; 1902-3-4, p. 664.)

§ 5523. **On what goods levied.**—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be

liable to distress, but for not more than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming, or agriculture, and for not more than twelve months' rent if the lands or premises are used for farming or agriculture whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section, nor shall the goods of the undertenant be liable to a greater amount than such undertenant owed the tenant at the time the distress was levied. (Code 1887, § 2791; 1922, p. 863; 1932, p. 696.)

§ 5524. **When goods not to be removed without paying six months' rent; lien for taxes, levies, and militia fines not affected.**—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are

in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming or agriculture, and not being more altogether than twelve months' rent, if the lands or premises are used for farming or agriculture. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.

For the purpose of this act a monthly or weekly tenancy shall not be construed as a new lease for every month or week of occupation of the premises by the tenant, but his tenancy shall be considered as a continuance of his original lease so long as he shall continue to occupy the property without making any new written lease. (Code 1887, § 2792; 1922, p. 863; 1932, p. 696.)

§ 5527. **When distress not unlawful because of irregularity, etc.**—Where distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party

distraining, or his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser ab initio; but the party aggrieved by such irregularity or unlawful act may, by action, recover full satisfaction for the special damage he shall have sustained thereby. (Code 1887, § 2794.)

§ 5528. **Return of distress warrants; process of sale thereunder.**—It shall be the duty of each officer who, under the present law may execute warrants of distress, except where it is otherwise provided by law, to make return of his action and proceedings upon such warrants as may be placed in his hands for collection, and file the same with the clerk of the circuit or corporation court of his county or city, as the case may be, except in the city of Richmond the same shall be filed with the clerk of the circuit court, or the clerk of the law and equity court, or the clerk of the law and equity court, part two, within sixty days after the same may have come to his hands, upon the return of such warrant it shall be the duty of such clerk to enter the same upon the execution book of his office after the manner as now provided by law as to executions issued by justices and returned unsatisfied, and the said clerk shall preserve such warrant in his office as is now provided as to such unsatisfied executions. If such return shall show that a levy has been made and that property levied on remains unsold, it shall be lawful for the said clerk of the court in whose office such return is filed to issue a writ of venditioni

exponas thereon just as if the said return were upon a writ of fieri facias. (1897-8, p. 755; 1930, p. 456).

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§ 5783. **For wrongful distress, etc.**—If property be distrained for any rent not due, or attached for any rent not accruing, or taken under any attachment sued out without good cause, the owner of such property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful seizure, and also, if the property be sold, for the sale thereof. (Code 1887, §2898.)

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§ 6518. **When and how forthcoming bond may be taken; property then remains in debtor's possession.**—The sheriff or other officer levying a writ of fieri facias, or distress warrant, may take from the debtor a bond, with sufficient surety, payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon (including his fee for taking the bond, commissions, and other lawful charges, if any), with condition that the property shall be forthcoming at the day and place of sale; whereupon, such property may be permitted to remain in the possession and at the risk of the debtor. (Code 1887, § 3617.)

§ 6519. **How tenant unable to give forthcoming bond may have distress warrant returned to court and make defense thereto; when officer,**

in such case, to take possession of property levied on; its sale, when perishable or expensive to keep.—On affidavit by a tenant, whose property has been levied on under a warrant of distress, that he is unable to give the bond required in the preceding section, and that he has a valid defense under section sixty-five hundred and twenty-two, the officer levying the warrant shall permit the property to remain in the possession and at the risk of the tenant, and shall return the warrant, together with the affidavit, to the first day of the next term of the circuit court of his county or corporation court of his corporation, and thereupon the landlord after ten days' notice in writing to the tenant, may make a motion before such court for a judgment for the amount of the rent and for a sale of the property levied on, as aforesaid, to which motion the tenant may make such defense as he is authorized to make, under section sixty-five hundred and twenty-two, to an action or motion on the bond where one is given. If, however, after such affidavit is made, the claimant of the rent, or some one for him, shall give bond with sufficient surety, in a penalty double the value of the property levied on, with condition to pay all costs and damages which may accrue to any one by reason of his suing out said warrant, the officer shall take possession of the property and hold the same subject to the order of the court. If the property be perishable, or expensive to keep, the court, or the judge thereof in vacation, may order it to be sold, and on the final trial

of the cause, the court shall dispose of the property, or proceeds of sale, according to the rights of the parties. (Code 1887, § 3618; 1902-3-4, p. 839.)

SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1944.

The United States of America, Petitioner, vs. Waddill, Holland & Flinn, Inc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[January 2, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

The issue here is whether, in a state proceeding under a general assignment for benefit of creditors, Section 3466 of the Revised Statutes, 31 U. S. C. § 191, gives priority to a claim of the United States over a landlord's lien and a municipal tax lien.

Mrs. Oeland Rougan, the assignor, operated a restaurant in Danville, Virginia, on premises leased from respondent Waddill, Holland & Flinn, Inc. On June 19, 1941, she executed a general deed of assignment to a trustee for the benefit of creditors, specifically conveying all personal property, fixtures and equipment used by her in the conduct of the restaurant and located on the premises. This property remained on the premises until sold by the trustee on July 12, 1941. After deduction of appropriate administrative expenses, a sum of $1,407.29 remained. Four creditors claimed priority of payment from this amount.

(1) The United States claimed the sum of $1,559.63, plus interest, representing certain unpaid federal unemployment compensation taxes and a debt arising out of a Federal Housing Administration transaction.

(2) The Virginia Unemployment Compensation Commission made a tax claim of $66.38, plus interest. The Commission's claim, however, was conceded to be subordinate to that of the United States and need not be further considered here.

(3) The City of Danville claimed $30.55 as personal property taxes still unpaid. On July 2, 1941, the City Collector distrained on all of the property on the leased premises.

(4) The landlord, Waddill, Holland & Flinn, Inc., claimed $1,500.00 for six months' rent due and to become due. The as-

signor's lease from this firm run for five years beginning January 1, 1937, at a monthly rental of $250.00. On July 1, 1941, twelve days after the deed of assignment was executed, the firm obtained the issuance of a distress warrant for 3 2/5 months' past due rent, and an attachment for 2 3/5 months' future installments of rent. On the same day, the firm levied the warrant and attachment on the assignor's property located on the leased premises.

The trustee under the general assignment filed a petition in the Corporation Court of Danville, reciting the various claims and requesting advice as to the proper distribution. That court held that the landlord was entitled to priority in payment over the claims of the United States and the Virginia Unemployment Compensation Commission but that its claim was subordinate to that of the City of Danville for taxes in the sum of $222.31. On appeal by the United States, the Supreme Court of Appeals of Virginia affirmed this order of distribution. 182 Va. 351, 28 S. E. 2d 741. We granted certiorari because of the importance of the problems raised and because of asserted conflict with this Court's decisions in *New York* v. *Mackay*, 285 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480.

Section 3466 of the Revised Statutes provides in pertinent part that "the debts due to the United States shall be first satisfied" whenever any person indebted to the United States is insolvent or, "not having sufficient property to pay all his debts, makes a voluntary assignment thereof." We hold that this statute clearly subordinates the claims of both the landlord and the municipality to that of the United States. The judgment of the court below must accordingly be reversed.

The words of Section 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States. *Thelusson* v. *Smith*, 2 Wheat. 396, 425; *United States* v. *Texas*, *supra*, 484. But this Court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 441, 442; *Beers* v. *Bank of Washington*, 10 Pet. 596, 611, 612; *Spokane County* v. *United States*, 279 U. S. 80, 95; *United States* v. *Kaw*, 298 U. S. 544, 551; *New York* v. *Mackay*, *supra*, 293, 294; *United*

States v. *Texas*, *supra*, 485, 486. It is within this suggested exception that the landlord and the municipality seek to bring themselves. Once again, however, we do not reach a decision as to whether such an exception is permissible for we do not believe that the asserted liens of the landlord and the municipality were sufficiently specific and perfected on the date of the voluntary assignment to cast any serious doubt on the priority of the claim of the United States.

The landlord rests its claim upon certain provisions of the Virginia Code of 1936. Sections 5519 and 5523 authorize a landlord to levy distress for six months' rent upon "any goods of the lessee . . . found on the premises, or which may have been removed therefrom not more than thirty days. . . . for not more than six months' rent if the premises are in a city or town." Section 5524 provides that the goods of the tenant on leased premises in a city or town may not be removed by a lienor or purchaser, nor taken under legal process, save "on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due," not to exceed six months' rent. Other sections provide for officers making the distress under warrant from a justice, founded upon an affidavit of the person claiming the rent, and for such officers to make returns of their actions and proceedings upon such warrants. Provisions are also made for legal proceedings looking toward the possession and sale of the property to satisfy the debt.

The Supreme Court of Appeals of Virginia has here held that these sections "give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it." 182 Va. at 363, 28 S. E. 2d, at 746. It has also held that such a lien "relates back to the beginning of the tenancy." 182 Va. at 364, 28 S. E. 2d at 746, thus giving it force and effect on date of the voluntary assignment. These interpretations of the Virginia statutes, as propositions of state law, are binding. But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to

examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supercede a long-standing Congressional declaration of priority. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, *supra*, 90.

Tested by its legal effect under Virginia law, the landlord's lien in this instance appeared to serve "merely as a *caveat* of a more perfect lien to come." *New York* v. *Maclay*, *supra*, 294. As of the date of the voluntary assignment, it was neither specific nor perfected. It gave the landlord only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof.

Specificity was clearly lacking as to the lien on June 10, 1941, the date of the assignment. On that day it was still uncertain whether the landlord would ever assert and insist upon its statutory lien. Until that was done it was impossible to determine the particular six months' rent, or a proportion thereof, upon which the lien was based. The lien did not relate to any particular six months' rent but could attach only for the rent which might be due at or after the time when the lien was asserted. *Wades* v. *Eggart*, 75 Va. 579, 582. And if it were asserted at a time when the tenancy had terminated or would terminate within six months of the date to which rent had been fully paid, the lien could only cover less than six months' rent. Conceivably the amount of rent due or to become due was uncertain on the day of the assignment. The landlord may have been mistaken as to the rental rate or as to payments previously made and the tenant may have been entitled to a set-off. *See Allen* v. *Hart*, 18 Gratt. (59 Va.) 722, 737; *Hancock* v. *Whitehall, &c., Co.*, 100 Va. 443, 447. Moreover, while the lien legally attached to all such property as might be on the premises when the lien was asserted or within thirty days prior to distraint, the landlord could distrain goods only to the extent necessary to satisfy the rent justly believed to be due, the tenant possessing an action for damages for excessive distraint. Va. Code § 5783; *Fishburne* v. *Engeldove*, 91 Va. 548; *Garfein* v. *Howell*, 142 Va. 197. Thus until the extent of the lien was made known by the landlord and until some steps had been taken to distrain or attach sufficient property to satisfy the lien, it was impossible to specify the goods actually and properly subject to

the lien. Some of the goods on the premises may have been subject to mortgages or liens which attached before the goods were brought on the premises, in which case the landlord's lien would be inferior. Va. Code § 5523. And if other goods were removed after the date of the voluntary assignment but more than thirty days before the distraint or attachment, the right of distraint and attachment as to those goods would disappear. Va. Code § 5523; *Dime Deposit Bank* v. *Wescott*; 113 Va. 567. These factors compel the conclusion that neither the rent secured by the lien nor the property subject to the lien was sufficiently specific and ascertainable on the day of the voluntary assignment to fall within the terms of the suggested exception.

Nor was the statutory lien perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law. The tenant was divested of neither title nor possession by the mere existence of the landlord's statutory lien on the date of the assignment. Only after the lien was actively asserted and an attachment or a distraint levied, enabling the landlord to satisfy his claim out of the seized goods, could it be argued that such goods severed themselves from the general and free assets of the tenant from which the claims of the United States were entitled to priority of payment. Prior to that time, the lien operated to do no more than prevent the removal of goods from the premises by certain classes of persons. Va. Code § 5524, and give the landlord priority in distribution under state law provided that the goods remained on the premises. Such a "potential, inchoate lien" could not disturb the clear command of Section 3466 of the Revised Statutes. Something more than a "*caveat* of a more perfect lien to come" was necessary.

The lien of the City of Danville stands in no better position insofar as the claim of the United States is concerned. The municipality contends that it assessed taxes on specific items of furniture and equipment pursuant to annual levies made by the city council and that a lien attached to such property on January 1, 1941, by operation of state law. It claims that this lien attached before the claim of the United States was acquired and hence had priority.

Under Virginia law, however, a municipal tax confers a lien on personal property which enables the city to follow it wherever it may be taken only if the assessment is specifically made on such property. *Drewry* v. *Baugh and Sons*, 150 Va. 394, 400, 401;